

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PUTNAM COUNTY ENVIRONMENTAL, )  
COUNCIL, INC.; STEWARDS OF )  
THE ST. JOHNS RIVER, INC., )  
AND LINDA YOUNG, )

Petitioners, )

vs. )

GEORGIA-PACIFIC CORPORATION, )  
and FLORIDA DEPARTMENT OF )  
ENVIRONMENTAL PROTECTION, )

Respondents. )

DOAH CASE NO:  
01-2442

OGC CASE NO:  
01-0866

COPY

Transcript of telephonic Administrative  
Hearing beginning at 9:00 a.m. and concluding at  
12:00 p.m. on February 13, 2002, taken at Bay  
Area Reporting, 2102 Government Street, Mobile,  
Alabama 36606 before the Honorable Donald  
Alexander, Administrative Law Judge.

## 1 A P P E A R A N C E S

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4 DIVISION OF ADMINISTRATIVE HEARINGS  
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2 PROTECTION:

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23 JANET C. BROOKS, COURT REPORTER

## I N D E X

PAGE:

Commencement of proceeding . . . . . 5

EXHIBIT:

PAGE:

None were marked to this proceeding.

1 THE COURT: We've got a number of  
2 pending motions that need to be taken up.  
3 As I indicated very briefly before we  
4 decided to terminate the telephone  
5 conference call on Monday, I have a motion  
6 for partial summary final order by  
7 Georgia-Pacific; a cross-motion for final  
8 order by Linda Young, which I'm going to  
9 deny on the basis that I don't have any  
10 authority to grant that type of relief in  
11 this proceeding under the authority of  
12 120.57(1)(H).

13 We do have a motion to limit testimony  
14 in the alternative by Georgia-Pacific, and I  
15 guess that's going to take up the bulk of  
16 the time this morning. Are the parties  
17 ready to go ahead and proceed on that  
18 motion?

19 MR. BROWN: Yes, Your Honor.

20 THE COURT: Let's go ahead and take up  
21 the motion then to limit testimony. The  
22 first issue in there, and I've got a  
23 question about it that maybe would answer

1       some of the concerns I have about the issue,  
2       on the TMDL, Total Maximum Daily Load,  
3       issues that have been raised in the motion.  
4       Mr. Brown, is that something that arose in  
5       the course of discovery or is that an issue  
6       that was raised in the pleadings themselves?

7               MR. BROWN: I could be mistaken but I  
8       do not believe it is mentioned in the  
9       petition. But during the testimony of Linda  
10      Young, she had indicated that one or more of  
11      their witnesses may wish to present  
12      testimony regarding the TMDL program. It is  
13      our position that such testimony would not  
14      be relevant to the agency action at issue in  
15      these proceedings. Now, that begs a further  
16      question: If it's not pled, should we even  
17      be addressing it at all? I think that  
18      point's well taken.

19             THE COURT: I went through the  
20      complaint twice. I don't see anything  
21      about -- I don't see TMDL. I don't see the  
22      words "Total Maximum Daily Load." If it's  
23      something that just came up during the

1 course of discovery, then I'm wondering why  
2 we're even talking about it if it's not even  
3 pled in the petition. Mr. Brookes, do you  
4 know if that issue has been pled? If so, if  
5 you could, point it out to me, sir.

6 MR. BROOKES: Yes, Your Honor. In  
7 answer to your question, no, it is not in  
8 the petition. We have reviewed some of the  
9 petition based on Georgia-Pacific's motions  
10 in limine. There is some mention of  
11 impaired water bodies and that does relate  
12 to the mixing zone rule.

13 If you'll look at the administrative  
14 order on Page 12, Footnote 1, it basically  
15 says that if the receiving water body is  
16 listed as an impaired water body there will  
17 be no mixing zones allowed for the  
18 parameters for which the water body is  
19 listed.

20 So that is at issue. The impaired  
21 water body listing is separate and distinct  
22 from setting what they call a total maximum  
23 daily load, which is more like putting out

1 maximum load allocations to each individual  
2 pollution source. We're not getting into  
3 that aspect of the program. So the TMDL in  
4 answer to your question is, no, it's not in  
5 the petition.

6 The other thing I need to point out to  
7 the Court is that upon reviewing the  
8 petition, which was not drafted my me, and  
9 upon reviewing the motion for summary  
10 judgment or motion in limine, which the  
11 Court is considering, there were a number of  
12 rules that were cited that appeared to be  
13 incorrectly cited.

14 I have filed today -- or yesterday with  
15 DOHA and I was able to send by fax this  
16 morning to the parties, so I know it's not  
17 timely -- a motion to file a corrected  
18 amended petition. That takes out those  
19 rules that were improperly cited.

20 It also has in there the proposed  
21 permit amendment to change the mixing zone  
22 from that color to transparency and then  
23 also to expand that mixing zone from 48



1 meters to 367 meters. And it has in it some  
2 additional details on some of the  
3 paragraphs. However, even in that corrected  
4 amended petition there is no mention of  
5 TMDL. I don't think that is directly  
6 relevant to the proposed permit at issue but  
7 that the listing of impaired water bodies is  
8 directly at issue under the department's  
9 rules.

10 THE COURT: Okay. I'll go ahead and  
11 grant the motion to limit testimony, then,  
12 on the TMDL issues. It hasn't been pled so  
13 it's not really relevant.

14 MR. BROWN: Your Honor, may I ask for  
15 clarification? I'm not -- I'm sorry, did I  
16 interrupt you?

17 THE COURT: Is this Mr. Brown?

18 MR. BROWN: Excuse me. Yes, sir. Did  
19 I interrupt you? I apologize.

20 THE COURT: No. I needed you to  
21 identify yourself for the court reporter.  
22 Go ahead.

23 MR. BROWN: Well, just so there's no

1 confusion, Mr. Ralph had -- I had referred  
2 to -- as basically saying that, well, TMDLs  
3 were not pled but impaired waters are at  
4 issue. Your Honor, in some respect that's a  
5 distinction without a difference in that the  
6 TMDL program presupposes under Florida law a  
7 determination of whether a water is  
8 impaired. So when you're talking about one  
9 he's talking about the other.

10 One initial difficulty I have with  
11 Mr. Brookes' argument is that no mention is  
12 made in the petition of any regulations or  
13 any theory about regulations of impaired  
14 water's determination. You said it was  
15 mentioned in a footnote in the  
16 administrative order. But that issue,  
17 again, was not raised in the petition and we  
18 believe it should be foreclosed simply on  
19 the basis that it wasn't pled.

20 THE COURT: That was what the intent of  
21 my ruling was. Anything on these TMDLs,  
22 that's something I assume everyone who does  
23 these type of cases would have familiarity

1 with and would understand TMDL or the words  
2 "Total Maximum Daily Load" as something that  
3 could have been easily pled. It's not in  
4 there so I would grant the motion.

5 Mr. Brookes, I guess I'm not clear.  
6 Are you wanting to put in testimony on  
7 impaired waters in a state and where is that  
8 issue pled? Not where does it appear in the  
9 administrative order but where is that pled  
10 in the complaint?

11 MR. BROOKES: Yes, Your Honor. As I  
12 flip through the complaint let me just,  
13 again, state that there is a distinction  
14 between setting a TMDL and the impaired  
15 water bodies list, and whether something is  
16 listed as an impaired water body under this  
17 1998 what they call the 303-D list.

18 THE COURT: Well, I understand that. I  
19 think I understand that but where is that  
20 issue pled in the complaint?

21 MR. BROOKES: Hold on, Your Honor, one  
22 second. I know that it's in the corrected  
23 amended one. I'm searching the original one

1 here to make sure that I know where it is in  
2 here, if it's in here at all. If we begin  
3 looking at -- this original petition didn't  
4 have page numbers on it. But if we look at  
5 Paragraph 68, Paragraph 69 and Paragraph 70,  
6 Paragraph 71, Paragraph 72, they talk about  
7 mixing zones and not meeting the rules  
8 applicable to mixing zones. There is a  
9 mixing zone rule that says you shall not  
10 allow a discharge into an impaired water  
11 body if you degrade the designated uses of  
12 that water body.

13 These paragraphs talk about the  
14 discharge in terms of the mixing zones,  
15 which is the only area we're really bringing  
16 up is impaired designation. Not being  
17 allowed to significantly impair these water  
18 bodies, not interfering with the suitability  
19 for recreation, proper issue, maintenance of  
20 a healthy well-balanced population of fish  
21 and wildlife.

22 It talks about the designation of the  
23 water bodies in 69, the impact on the

1 designated uses of the river. And in 70 it  
2 states -- this is a textbook example of when  
3 not to allow a mixing zone under the rules,  
4 citing to the 62-4. And then in 71, again,  
5 states your water quality -- and "water  
6 quality standards are to support the present  
7 and future most beneficial uses under  
8 62-302, which are Class III uses must be  
9 protected."

10 And then in 72 they're asking for  
11 mixing zones for iron, cadmium, lead,  
12 ammonia, turbidity, specific conductance and  
13 color. Some of these are parameters for  
14 which the Rice Creek and the St. Johns River  
15 immediately downstream from the confluence  
16 of the Rice Creek are listed as impaired  
17 water bodies for those parameters.

18 THE COURT: Well, I'm reading what  
19 you're saying there. I guess I don't  
20 understand --

21 MR. BROOKES: It comes in with that  
22 mixing zone rule where it says -- the mixing  
23 zone rule that they basically shall not be

1       allowed in impaired water bodies for those  
2       programmers for which they're listed, or  
3       that would interfere with the designated  
4       uses of the impaired water body.

5               THE COURT: I guess I still don't  
6       understand. I'm going to grant the motion  
7       about any testimony about TMDL regulations.  
8       Mr. Brown, what's your concern now, sir?

9               MR. BROWN: If your ruling is that  
10      there won't be any testimony on the TMDL  
11      program or an administrative determination  
12      as to whether an impaired water -- or a  
13      determination of impaired waters, then I  
14      believe you've granted the relief we  
15      requested.

16              I would have additional substantive  
17      grounds with respect to the presentation of  
18      that evidence but if that's your ruling on  
19      that basis -- if I understand your ruling,  
20      then I don't know if I need to argue  
21      further.

22              THE COURT: All right.

23              MR. BROOKES: Your Honor, if I might

1 help clarify. We do not intend to give  
2 testimony on the impaired water bodies  
3 rule -- or, excuse me, the total maximum  
4 daily load rule. What we are talking about  
5 is the rule that's applicable for mixing  
6 zones and which is at issue and is the  
7 subject of the permit and the hearing in  
8 that the department has granted a mixing  
9 zone.

10 THE COURT: Okay.

11 MR. BROOKES: It has to meet the mixing  
12 zone rules. The mixing zone rules have a  
13 few sections in that rule that deal with  
14 mixing zones in impaired water bodies.

15 MR. BROWN: Your Honor, could I ask  
16 Mr. Cole to address the provisions of this  
17 rule? I hate to double team on this but we  
18 do have several attorneys on this other  
19 side. With no objection, would you permit  
20 Mr. Cole to analyze the mixing zone rule on  
21 that question?

22 THE COURT: Yes, sir.

23 MR. COLE: The mixing zone rule is

1 found in 62-4.244 (1). I believe Mr.  
2 Brookes had made a reference to that. I  
3 have that in front of me. There is no  
4 reference in there to any cor admission of  
5 mixing zone in impaired waters. So as we  
6 get into that, the citation authority  
7 doesn't really support what is being said  
8 there.

9 THE COURT: That is a subject of a  
10 later part of your motion, is it not, on the  
11 mixing zones?

12 MR. COLE: This actually, Your Honor,  
13 should be the only area, unless I'm  
14 forgetting something, where the mixing zone  
15 issue should come up.

16 THE COURT: Okay.

17 MR. KEYSER: Judge, may I be heard?

18 THE COURT: Yes, sir, go ahead.

19 MR. BROWN: Judge, as I understand it,  
20 the whole theory underlying this permit is  
21 the greater dilution ability of the  
22 St. Johns River as opposed to Rice Creek.  
23 If you don't allow testimony that would show



1           that these waters don't have such dilution  
2           incapacity, then the theory upon which the  
3           permit is graduated wouldn't be -- doesn't  
4           have any basis. It would seem that we  
5           certainly have every right to attack the  
6           underlying assumptions and theories that  
7           allow the granting of this permit.

8           MR. COLE: Your Honor, may I respond?

9           THE COURT: Yes, sir.

10          MR. COLE: Your Honor, I don't think we  
11          have a problem with what Mr. Keyser said but  
12          I understand that to be different than what  
13          I'd heard. Our objection was to testimony  
14          regarding whether or not this is on some  
15          informal list of DEP when Impaired Waters  
16          program is still in its developmental stage  
17          and, in fact, a proposed rule dealing with  
18          it is under challenge and is pending a final  
19          order before the division right now.

20          So we're trying to preclude testimony  
21          regarding the question of whether or not it  
22          is or is not on some impaired waters' list.  
23          We're not attempting to keep them out of

1 doing exactly what Mr. Keyser just  
2 represented. I think his point is well  
3 taken in terms of whether there's a  
4 subletting capacity.

5 I will say that my statement would be  
6 qualified somewhat by the second level of  
7 arguments we would get into in a moment; and  
8 that is, in certain cases have some of those  
9 questions been answered by the department's  
10 proposed action and by a waiver of the  
11 opportunity for hearing by petitioners.

12 But to the extent that something is not  
13 covered by the QBEL, which we believe to be  
14 final and a waiver of hearing, having been  
15 taken on that or allowed, is foreclosed. So  
16 I don't know if that muddled it up or  
17 explained it but we agree that there is a  
18 subletting capacity question to a certain  
19 extent; to the extent it has not been  
20 waived.

21 But the fact that St. Johns is or is  
22 not on some informal list is not something  
23 we should get into and argue about at this

1 proceeding.

2 MR. BROOKES: Your Honor, this is Ralph  
3 Brookes again. Attached to our response  
4 there are a few exhibits. There's Exhibit E  
5 and Exhibit F. Exhibit E is a letter from  
6 DEP, Jerry Brooks, Deputy Director of the  
7 Division of Water Resources to EPA stating  
8 that this is a 303-D list. Exhibit F is the  
9 actual 1998 303-D list. I apologize for not  
10 circling these things on the document but I  
11 didn't want to change the document.

12 If you'll look at the first page, which  
13 is Page 39, about halfway down the page it  
14 says, "St. Johns River low" and where it  
15 says "Rice Creek upstream to mill" and has a  
16 water body identification number and then it  
17 states the parameters of concern; color  
18 foams, nutrients, iron and lead. These are  
19 parameters that we are challenging in the  
20 proposed permit.

21 On the second page of it, or page 40,  
22 the very first entry is Rice Creek  
23 downstream to mill 2567-A. Those are the

1 parameters there that are impacted, and  
2 which the receiving water body currently  
3 doesn't meet state water quality standards  
4 on occasion for those parameters.

5 On Page 42 there are two other sections  
6 of the St. Johns River that are nearby that  
7 are also listed as impaired for certain  
8 parameters; all of which are present in the  
9 effluent and will be the subject of the  
10 hearing. And whether or not there is  
11 sufficient dilution, whether or not the  
12 water body's already impaired for these  
13 parameters and whether or not a mixing zone  
14 can be granted under the mixing zone rules  
15 if the designated uses are impacted.

16 MR. BROWN: Your Honor, may I respond  
17 to that argument?

18 THE COURT: My ruling is simply what's  
19 been requested here by Georgia-Pacific.  
20 They're wanting to exclude any testimony  
21 regarding an analysis of the parties in  
22 compliance with federal TMDL regulations.  
23 I'm granting the motion as to that

1 particular issue. Are we getting into  
2 another argument at this point about mixing  
3 zones?

4 MR. BROWN: Your Honor, we had also  
5 asked that the same be applied with respect  
6 to the state TMDL regulatory program as  
7 well, but beyond that I'm ready to move on  
8 if you are also foreclosing that evidence.

9 THE COURT: The only thing you've asked  
10 for is federal TMDL regulations. I don't  
11 know if there's any mention of state TMDL  
12 regulations in the complaint. But if there  
13 are not, then I assume that if any testimony  
14 were offered at the hearing you could raise  
15 an objection at that point in time.

16 MR. BROWN: We're ready to move on with  
17 that ruling, Your Honor.

18 THE COURT: All right. The next issue  
19 is the WQBEL issues. Mr. Brown, you're  
20 going to be arguing on that?

21 MR. BROWN: Yes, Your Honor.

22 THE COURT: I've got a pretty good  
23 handle on this or I think I do. For this

1 particular applicant, the levels were  
2 established in March '98. There was a point  
3 of entry, I guess through the inadvertence  
4 or whatever, to challenge that determination  
5 in August of 2001. There was no request for  
6 a hearing by a third party.

7 Mr. Brown, you're contending that they  
8 waive their right to challenge any  
9 limitations that were established back in  
10 March of '98 because they didn't exercise  
11 their right to request a hearing within 21  
12 days after the point of entry was offered in  
13 August of 2001?

14 MR. BROWN: That's correct, Your Honor.

15 THE COURT: That may be oversimplifying  
16 it. Ms. Folkes, you've got a slightly  
17 different take on it, do you not?

18 MS. FOLKES: Yes, Your Honor. In my  
19 review of what the department has done in  
20 the past when a point of entry has  
21 essentially not been given in a timely  
22 fashion, is that -- and there is no case law  
23 on this. I'm really speaking more of what

1 the department practice has been. And that  
2 is to look at a petition that has come in in  
3 the interim.

4 For example, there's a petition that  
5 came in on behalf of the petitioners in this  
6 case, which was filed prior to that  
7 August 2001 publication in the newspaper. I  
8 looked at the petition closely and  
9 determined if issues are being raised to --  
10 if issues are being raised to address the  
11 QBEL.

12 In rereviewing the petition and the  
13 QBEL, I found it difficult in the sense  
14 that -- of course, the QBEL limits, the  
15 final limits argued in the permit -- and  
16 some of those are challenged in the  
17 petition, whether the limit itself or the  
18 lack of a limit for a certain parameter.

19 So that's why the department's response  
20 was basically very short in the sense that I  
21 think our position would be that whatever  
22 was raised in the petition, Ms. Young should  
23 be allowed to go ahead with. If it was not

1       raised in the petition, then it should be  
2       foreclosed.

3               THE COURT: Mr. Brookes, did you want  
4       to comment?

5               MR. BROOKES: Just briefly, Your Honor.  
6       I might be able to point out a few more  
7       things. In the response that we have filed,  
8       you'll note that there was some testimony in  
9       deposition and some other documents that  
10      seem to indicate that the department  
11      intended on publishing these QBELs in the  
12      notice with the proposed permit.

13              If you look at the actual QBEL rule,  
14      which is 62-650.500 (9), it states that the  
15      department shall issue a final order, which  
16      may be a permit, setting forth the effluent  
17      limits and permitting requirements and  
18      required date of compliance with the  
19      specified requirements.

20              So we think that probably in the past  
21      the department has noticed these QBELs along  
22      the same time that they do the proposed  
23      permit, that seems to be what we've relied



1       upon. By seeing these effluent limitations  
2       in the proposed permit, we have then  
3       challenged that proposed permit.

4               One other thing is that I think that  
5       120.5692A addresses the issue in that once  
6       we have challenged these limitations the  
7       agency, and in this case the applicant, has  
8       published a notice on their own basically  
9       without the agency at that point many years  
10      later.

11             Once we filed the petition and the  
12      issue gets referred to DOHA, that should be  
13      the mechanism of our point of entry where we  
14      had filed to challenge anything further in  
15      reliance on that should basically wait until  
16      we've had a chance to participate in the  
17      agency decision-making under 120 and should  
18      happen through the proceeding itself.

19             I think the statute refers -- states as  
20      a party litigant. We may not be in  
21      litigation but I think the statute  
22      contemplates in 120 that we would be  
23      considered litigants, as long as the

1 division has jurisdiction over the  
2 proceedings.

3 This division had jurisdiction over  
4 these effluent limitations at the time that  
5 this late notice was published after we had  
6 filed, after it had been referred to DOHA  
7 and after we had raised these questions.  
8 The situation may have been different if the  
9 QBEL had been published back in 1998 but  
10 that did not occur.

11 The other thing I did want to raise  
12 here is, and as is contained in the  
13 corrected amended petition, is the fact that  
14 if these QBELs contain limitations that are  
15 then supposed to be in the permit, the QBEL  
16 contains limitations that are not contained  
17 in the proposed permit and the permit is  
18 less stringent than the QBELs that were, in  
19 fact, published. So that is also  
20 problematic.

21 The examples I can cite there is that  
22 the QBEL has a flow limitation. And that  
23 flow limitation was published in the Palatka

1 paper but there is no flow limitation on how  
2 many gallons per day can be released from  
3 the facility.

4 Conductivity, the QBEL was 1950. The  
5 proposed permit limit is 2467. So it's much  
6 above the QBEL. That raises an issue of law  
7 for later as to whether or not that can  
8 actually be done if those QBELs are, in  
9 fact, set in stone. We think that the more  
10 appropriate course, because this was  
11 published after we'd already challenged  
12 these effluent limitations, is to allow the  
13 agency to consider testimony that's brought  
14 into this agency decision-making hearing on  
15 effluent limitations for the discharge  
16 itself. That's really what's at issue.

17 THE COURT: I am more inclined to agree  
18 with Ms. Folkes' position on this issue. I  
19 think that even though the request for  
20 hearing was filed back in May of 2001, at  
21 least to the issuance of the permit, and  
22 there was nothing filed after the  
23 August 2001 point of entry I think that

1       they, "they" being the petitioners, have  
2       preserved their right to be challenged; the  
3       effluent limitations that are addressed in  
4       that QBEL document. I guess you call it a  
5       technical document.

6               But I think that the petitioners would  
7       be limited in two respects. First, they  
8       would be limited to matters that were  
9       addressed in the document. And, two, any  
10      matters that were addressed in the document  
11      which were not specifically raised in the  
12      petition would now be waived. So I guess  
13      there may be a little bit of some argument  
14      here as to whether or not certain issues  
15      were raised in the petition regarding these  
16      WQBEL effluent limits.

17             Ms. Folkes, you've contended that the  
18      areas of specific conductance, cadmium, lead  
19      and zinc, you gave some examples, were not  
20      raised and therefore they should be  
21      excluded?

22             MS. FOLKES: Yes, Your Honor.

23             THE COURT: The only question I have

1 about that is -- let me look here at the  
2 original petition. I think it's over in the  
3 mixing zone area. It's Paragraph 67 and 72  
4 of the complaint, if counsel would take a  
5 look at those.

6 MS. FOLKES: Yes, Your Honor.

7 THE COURT: The only inquiry I have is  
8 that they do mention these -- I think I have  
9 it. Hold on.

10 MR. BROOKES: That's correct, Your  
11 Honor. I don't know what page but it's  
12 Paragraph 67.

13 THE COURT: Yes, and 72. They do  
14 mention cadmium --

15 MR. BROOKES: Iron, lead, ammonia.

16 THE COURT: Right. Now, that's raised  
17 in the context of an illegal mixing zone and  
18 not in the context of effluent limitations  
19 in the WQBEL technical document, as I  
20 understand those arguments in 67 and 72.

21 So my question to counsel is, I'm not  
22 sure whether or not you've raised the issue  
23 in the context to which the motion to limit

1 testimony is directed. Ms. Folkes, let me  
2 ask you first: Did you consider those  
3 allegations in 67 and 72?

4 MS. FOLKES: Yes, Your Honor. I  
5 consider them to be outside the motion and  
6 my response, which were directed to the  
7 effluent limits set by the QBEL document.  
8 In my mind, the limits set by the QBEL  
9 document in March of 1998 are part of a  
10 total process that then ended up with the  
11 effluent limits that are in the permit.

12 I do have to disagree with Mr. Brookes.  
13 At one point he said if those limits are set  
14 in stone then those are what should be  
15 reflected in the permit. That's not  
16 necessarily the case when all of the permits  
17 out there should be taken into consideration  
18 and all the things that apply to the water  
19 bodies. But to answer your question, Your  
20 Honor, I did take this into consideration.  
21 I did not consider Paragraph 67 and 72 as  
22 raising those parameters in the context of  
23 the QBEL document.

1 MR. BROWN: Those paragraphs do not  
2 mention any effluent limitations for those  
3 parameters.

4 THE COURT: All right. That was my  
5 reading of the complaint. Mr. Brookes, did  
6 you want to respond?

7 MR. BROOKES: Yes, Your Honor. The  
8 QBEL basically looks at establishing  
9 alternative water quality based effluent  
10 limitations that are then incorporated  
11 during the permitting process into the  
12 establishment of this mixing zone. The  
13 modeling that's done for the QBEL results in  
14 these load allocations.

15 It's as Francine says, incorporated  
16 then into the ultimate decision making on  
17 the mixing zones. The mixing zones  
18 themselves are in the tables that are  
19 contained in the proposed permit. Those  
20 tables have the mixing zone size and they  
21 also state the mixing zone effluent  
22 limitation for that area.

23 For example, if you look at the mixing

1        zones in the permit and the mixing zones in  
2        the AO, not only for the St. Johns but for  
3        the Rice Creek, these do get incorporated  
4        into what we're talking about here. So I  
5        think that they should -- that 67 and 72 we  
6        should be allowed to talk about the mixing  
7        zones for these parameters and what the  
8        limits are for effluent disposal into these  
9        mixing zones.

10                THE COURT: My question, though, is --  
11        I understand a little of what you're saying  
12        there because, again, I'm not a scientist.  
13        I don't see anything in the complaint that  
14        says you're quarreling with the effluent  
15        limitations that were established as to  
16        those parameters. I don't see anything  
17        about that in 67 or 72. If you could, point  
18        out the language that says not only are we  
19        challenging the legal mixing zone but we're  
20        also challenging the effluent limitations  
21        that were established in the WQBEL technical  
22        document. I mean, is there any language to  
23        that effect in 67 or 72 anywhere else?



1 MR. BROOKES: Hold on, Your Honor. I  
2 know that in the corrected amended petition  
3 that we filed that there is some reference  
4 but that is not before a state. So let me  
5 just look quickly at what was here before.

6 I know that the QBELs are about mixing  
7 zones, as I've stated. Let me just look  
8 here. I know that some of these matters  
9 were also mentioned in another area, I  
10 believe.

11 Your Honor, if we look still a bit  
12 further into 67 and 72 into the words that  
13 surround the iron, cadmium, lead, what we're  
14 talking about in 72 that these particular  
15 parameters or criteria would cause -- mixing  
16 zones of these criteria would cause  
17 violation of minimum criteria established in  
18 Florida Code Rule 62-302.500, which are the  
19 state water quality criteria in terms of  
20 numeric standards.

21 So I think that that incorporates  
22 effluent limitations in terms of numeric  
23 effluent limitations or narrative for

1 certain things but you can't get a mixing  
2 zone for a narrative. So what we're really  
3 looking at is mixing zones for numeric  
4 effluent limitations within that mixing  
5 zone. I think it's incorporated in  
6 Paragraph 72.

7 THE COURT: Well, I think --

8 MR. BROOKES: I mean, there is nothing  
9 left to talk about if we can't talk about  
10 the effluent limitations of the mixing zone.

11 MR. BROWN: Your Honor, those are  
12 separate regulatory requirements. That's  
13 simply mixing apples and oranges and I  
14 believe that issue has been raised simply by  
15 referring to mixing zones, Your Honor.

16 MR. BROOKES: Well, Your Honor, in 72  
17 it says that they would cause a violation of  
18 the minimum criteria in 62-302.500. Those  
19 are the tables of the water quality  
20 standards for the receiving water. They're  
21 the numeric effluent limitations. We're  
22 saying we're going to cause -- these mixings  
23 are going to cause violations of those

1 minimum criteria. And we also have some  
2 other things about the mixing zone but it's  
3 definitely included in that 72.

4 THE COURT: Counsel, I just don't read  
5 anything in here that says that you're  
6 challenging the effluent limitations that  
7 have been established in the WQBEL document  
8 in 67 or 72.

9 MR. BROOKES: Well, Your Honor, at the  
10 time we filed this we thought that these  
11 effluent limitations were contained in this  
12 proposed permit and that's what my client  
13 challenged. Then later on after we'd  
14 already challenged it, then they started  
15 trying to say, oh, well, here's these  
16 limitations. They're in the QBEL so you  
17 can't challenge those. We didn't even know  
18 about it. It was not given to us with  
19 direct notice. Even though we're a party  
20 litigant, it was published in this newspaper  
21 in Palatka that my client didn't see.

22 THE COURT: Well, I understand that.

23 MR. BROOKES: I think there's a

1 fundamental fairness or procedural due  
2 process argument there that may be a state  
3 constitutional argument that we could maybe  
4 perhaps preserve for appeal. But that we  
5 should be allowed to challenge these  
6 limitations that are incorporated in these  
7 mixing zones and into the permit and the AO  
8 where the QBEL is published after the fact.  
9 We were not given direct notice of it, even  
10 though we are a petitioner and the matter  
11 had been referred to DOHA and we're a party  
12 litigant.

13 THE COURT: I'm saying that you can do  
14 it with the two limitations that I mentioned  
15 earlier, that you had to raise them in your  
16 petition and that they're included in the  
17 WQBEL technical documents. So I'm going to  
18 go ahead and grant the motion to limit as to  
19 specific conductance, cadmium, lead and  
20 zinc. That you waived your right to  
21 challenge those by not including those  
22 parameters in your petition. I guess that  
23 would -- one other thing here --

1 MR. BROOKES: Your Honor, I do need to  
2 bring to your attention that those have now  
3 been included in this motion to file a  
4 corrected amended petition. I don't know  
5 how to deal with that but I had put that in.  
6 I just wanted to bring that to your  
7 attention. I don't know whether we can get  
8 a ruling on that today. I don't think we  
9 probably can, because the other parties  
10 haven't had it for long enough and I imagine  
11 they'll have some responses.

12 MR. BROWN: Your Honor, assuming they  
13 were sought to be raised in the amended  
14 petition, we haven't yet received a legible  
15 copy. I don't think there's any argument  
16 that there will be a timely challenge based  
17 upon first the publication dates. And  
18 second, one other matter I would like to  
19 bring to your attention is that in the  
20 responses filed in opposition to our motion,  
21 I believe Linda Young did acknowledge that  
22 she personally examined the QBEL when she  
23 was reading documents at our offices and did

1 actually receive notice of that document  
2 well before the filing of that proposed  
3 amended petition.

4 THE COURT: We can take up the amended  
5 document at a later time, the amended  
6 petition. The other area here is request to  
7 limit testimony on their right to challenge  
8 the department's theory to include effluent  
9 limits for parameters that are not addressed  
10 in the WQBEL or the proposed permit. And  
11 that's directed to Paragraph 73 through 77  
12 and 78 through 81 of the motion.

13 I think that's a valid contention.  
14 I'll go ahead and grant the motion now as to  
15 those issues. Is there any contention,  
16 Mr. Brown, on your part -- or I guess Ms.  
17 Folkes' part that they have raised in their  
18 complaint issues pertaining to iron, which  
19 is in Paragraph 25 of the complaint,  
20 biological oxygen demand and minimum  
21 dissolved oxygen levels, which are in 82  
22 through 85. I may be running through these  
23 too quickly. And 94, which is total

1       suspended solids and flow limits for  
2       discharge, which are in Paragraphs 31, 118  
3       and 119. I've assumed that they're  
4       addressed in this WQBEL document. Is there  
5       any contention, given the broad ruling that  
6       I made earlier, that they would not be  
7       entitled to pursue their claims as to these  
8       parameters? I'll start off with you,  
9       Ms. Folkes. I don't know if I went through  
10      that so quickly and you've had an  
11      opportunity to look at this.

12           MS. FOLKES: Yes, Your Honor, you did  
13      go through it rather quickly. You could  
14      repeat the paragraph that you were concerned  
15      about.

16           THE COURT: Sure. It's Paragraph 25.  
17      It's the very first one. I don't know if  
18      I'm looking at these in the right context or  
19      not but these are items that Mr. Brown had  
20      moved to exclude evidence on on the theory  
21      that they'd waived their right. And I'm  
22      ruling this morning they have not, that they  
23      preserved their right as to matters that

1 have been raised in the petition.

2 MS. FOLKES: Yes.

3 THE COURT: So with that ruling, are  
4 they in the ball game on Paragraph 25 as far  
5 as DEP is concerned?

6 MS. FOLKES: Yes, Your Honor.

7 THE COURT: Then if you'll go over to  
8 Paragraphs 82 through 85, those pertain to  
9 biological oxygen demand and minimum  
10 dissolved oxygen levels.

11 MS. FOLKES: Yes, Your Honor.

12 THE COURT: You would agree they would  
13 be entitled to pursue those claims?

14 MS. FOLKES: Yes, Your Honor.

15 THE COURT: And then in Paragraph 94,  
16 the total suspended solids, flow limits,  
17 whatever those are, those are found in three  
18 Paragraphs, 31, 118 and 119.

19 MR. BROOKES: Your Honor, that's the  
20 limitation on how many million gallons a day  
21 can be discharged from the facility.

22 THE COURT: All right.

23 MR. BROOKES: We're calling that a flow



1 limit perhaps for -- that's kind of a term  
2 that's used.

3 THE COURT: Those are the paragraphs  
4 that Mr. Brown has cited in his motion.

5 MS. FOLKES: Yes, Your Honor, I would  
6 agree that those also appear to be waived.

7 THE COURT: Mr. Brown, did you want to  
8 respond, sir?

9 MR. BROWN: Paragraph by paragraph?

10 THE COURT: Given what my ruling is, I  
11 just want to know whether or not you think  
12 that they've adequately pled those issues in  
13 those paragraphs. I guess if you've got any  
14 problem with any one of them I'm going to  
15 have to address them separately.

16 MR. BROWN: In Paragraph 25 the  
17 petitioners refer to the ability to treat  
18 iron but that is a factual allegation. It  
19 could have a number of different regulatory  
20 ramifications. But there is now no  
21 complaint about effluent limits or a lack of  
22 effluent limit on iron. It would be our  
23 position that that issue was not pled in

1 this petition.

2 THE COURT: Mr. Brookes.

3 MR. BROOKES: Again, Your Honor, back  
4 to Paragraph 72. We have talked about the  
5 permit, total recoverable iron. Also back  
6 in Paragraph 67.

7 THE COURT: Well, I've already ruled  
8 that 67 and 72 don't raise those issues in  
9 the context of the WQBEL technical document.  
10 So if 25 is predicated on what's pled in 67  
11 and 72, I'll go ahead and --

12 MR. BROOKES: Well, Your Honor, the  
13 other thing is that it's part of 25. We say  
14 that Georgia-Pacific basically should not be  
15 able to receive the permit with the present  
16 treatment or lack thereof concerning iron.  
17 That is because the current posed permit  
18 level for iron does not meet the state water  
19 quality standard for iron. So I think  
20 that's adequately addressed in that  
21 Paragraph 25.

22 If you'll look at the permit, Page 4,  
23 and you look at iron, there is no daily

1 maximum or monthly average listed. There is  
2 no way to guarantee that they will meet the  
3 state water quality standard for iron on the  
4 facility. We will show that there are  
5 problems with iron, meeting the state water  
6 quality standard.

7 It's also in the table referred over  
8 to -- excuse me. It actually has a 2.91,  
9 which is I believe greater than the state  
10 water quality standard for iron. So that's  
11 what we're talking about here. We shouldn't  
12 allow a standard that's greater than the  
13 class three standard, unless there's simply  
14 no treatment or some reason that you could  
15 treat for this iron. So it should be  
16 treated and it should be brought to the  
17 state water quality standard.

18 There's been no variance. There's been  
19 no waiver. No site-specific alternative  
20 criteria applied for that parameter.

21 THE COURT: Are you arguing that the  
22 document doesn't establish adequate effluent  
23 limitations or are you arguing that -- are

1       you challenging the level that's been  
2       established in the WQBEL?

3               MR. BROOKES: It depends on which  
4       parameter we're talking about. But with  
5       regard to iron it has 2.91, which we're  
6       arguing does not meet the state water  
7       quality standard for the receiving water  
8       body.

9               THE COURT: Ms. Folkes, could you --

10              MS. FOLKES: Your Honor, if Mr. Brookes  
11       is challenging the 2.91, that's what was  
12       established in the QBEL. Going back to your  
13       ruling, and the way even Mr. Brookes has  
14       explained it, would suggest that that number  
15       cannot be challenged in terms of how it was  
16       established. The question of whether or not  
17       that number will cause a violation of water  
18       quality standards might be a different  
19       question that the petitioners could raise.

20              THE COURT: Well, I guess I'm a little  
21       confused here. I don't want to sit here and  
22       try to get an education on this issue this  
23       morning.

1 MR. BROOKES: I think these might be  
2 more appropriate when we see what context  
3 these things are raised at during the  
4 hearing, Your Honor.

5 THE COURT: Well, I'm trying to save  
6 time now by making some rulings so we don't  
7 have to spend a lot of time on argument at  
8 the hearing. I'll go ahead and wait on  
9 Paragraph 25. I'm just not totally clear on  
10 that right now. I'll go ahead and assume  
11 that you haven't waived your right to raise  
12 the allegation in Paragraph 25.

13 Mr. Brown, did you have anything on  
14 Paragraphs 82 through 85 on the BOD and the  
15 dissolved oxygen levels?

16 MR. BROWN: Right. I think that in the  
17 context of your ruling I think your analysis  
18 of those paragraphs is appropriate.

19 THE COURT: What about Paragraph 94,  
20 which is total suspended solids?

21 MR. BROWN: They've explicitly alleged  
22 that the DEP has not required necessary and  
23 appropriate effluent limits for TSS. So I

1           could not make an argument that would be  
2           inconsistent with your ruling.

3           THE COURT: And the flow limits,  
4           Paragraphs 31, 118 and 119 that's referred  
5           to in your motion?

6           MR. BROWN: I think that your ruling  
7           is -- your analysis of those paragraphs is  
8           consistent with your ruling.

9           THE COURT: Mr. Brookes, as I  
10          understand it, you don't have any objection  
11          to granting the motion to limit evidence  
12          regarding citations pertaining to 62-610,  
13          62-611, 62-670 and 62-671 which appear in  
14          Paragraphs 15 and 65 of your petition? Is  
15          that correct, sir?

16          MR. BROOKES: I think that those are  
17          the correct rule numbers. I've taken them  
18          out in the corrected petition.

19          THE COURT: I'll grant the motion then  
20          as to the allegations in Paragraphs 15 and  
21          65. Finally, we've got a motion to exclude  
22          evidence regarding allegations lacking any  
23          regulatory basis.

1 MR. BROOKES: Your Honor, I'm not sure  
2 I've seen that motion. I'm not prepared to  
3 argue that.

4 MR. BROWN: That was part of the motion  
5 we've been addressing beginning at Page 10.

6 MR. BROOKES: Oh, okay. I'm sorry. I  
7 thought it was a separately filed motion  
8 when you were calling it that. I'm sorry.  
9 I see it now.

10 THE COURT: There's allegations in  
11 Paragraphs 27 and 97 referring to the  
12 defoaming agents. Mr. Brown's indicated in  
13 his motion there's no water quality standard  
14 that pertains to defoaming agents;  
15 therefore, it wouldn't have any application.  
16 An allegation such as that would have no  
17 relevance to this proceeding. Ms. Folkes,  
18 do you have a position on that before I get  
19 to Mr. Brookes?

20 MS. FOLKES: We're in agreement with  
21 Mr. Brown's motion.

22 THE COURT: All right. Mr. Brookes.

23 MR. BROOKES: Your Honor, these

1       defoaming agents, we believe, are regulated  
2       under this free-from standard. And the  
3       free-froms are addressed in the petition.

4               MS. FOLKES: Your Honor, Paragraph 97  
5       in the petition makes reference to the fact  
6       that DEP has not prescribed an affluent  
7       limitation concerning defoamers. And as  
8       Mr. Brown has pointed out, there is no  
9       numerical one that exists in the state rules  
10      which the department could impose in the  
11      format.

12             MR. BROOKES: Your Honor, that  
13      free-from standard is a narrative standard.  
14      You may be familiar with it. It says that  
15      the discharge shall be free from substances  
16      that are known to contain carcinogens,  
17      teratogenic, mutagenic in concentrations  
18      that can cause those effects, to paraphrase  
19      that particular rule. It's more a narrative  
20      free-from type standard rather than a  
21      specific numeric limitation.

22             THE COURT: Is there a state standard  
23      or not?



1 MR. BROOKES: Yes. There is, Your  
2 Honor, for defoamers that are known  
3 carcinogens, mutigents or tetrogents.

4 THE COURT: Is there a number on that,  
5 a rule number, or what?

6 MR. BROOKES: The rule number on that,  
7 I think, is 62-302 and I can't remember the  
8 subsection. Let's see. It might be in my  
9 corrected petition. It's 62-302.500  
10 (1)(a)(5).

11 THE COURT: Ms. Folkes, are you  
12 familiar with that?

13 MS. FOLKES: Yes, Your Honor. The  
14 free-from standards. I guess the problem  
15 was the way that the petitioner has pled.  
16 This issue, Your Honor, refers to the fact  
17 that the department has not prescribed an  
18 effluent limit, which as we've indicated  
19 would be impossible.

20 Now, if the petitioners wish to present  
21 evidence to show that the defoamers or the  
22 defoaming agents used by Georgia-Pacific  
23 will degrade the waters, they probably are

1 free to try and present that information.  
2 That is, would degrade the water to such  
3 that the free-from narrative standard would  
4 be violated. But I guess as it's pled now  
5 in the petition, the department still has to  
6 agree with Mr. Brown that there is no  
7 effluent limit that can be imposed by the  
8 department at this point in the permit.

9 THE COURT: All right. I'll grant the  
10 motion to exclude evidence on that issue.  
11 The same would hold true then for Paragraph  
12 27. I'm looking at 97. The same would be  
13 true as to 27 where they talk about  
14 defoaming agents.

15 The next item is the allegation that  
16 the proposed permit contains no monitoring  
17 requirements at the edge of the mixing  
18 zones. Mr. Brown, you've indicated that  
19 there is no rule or statute which imposes  
20 this requirement. Ms. Folkes, do you agree  
21 or disagree with that?

22 MS. FOLKES: I agree, Your Honor.  
23 There is no rule or in the statute that

1 requires monitoring at the edge of mixing  
2 zones. So I guess I will agree with  
3 Mr. Brown's motions about 110 through 112.

4 THE COURT: Mr. Brookes.

5 MR. BROOKES: Your Honor, it's our  
6 contention that it's a disputed issue of  
7 law, and a fact that the monitoring at the  
8 edge of the mixing zone is required, or  
9 should be required, to ensure compliance  
10 with state water quality standards at those  
11 boundaries.

12 We think that's a requirement of state  
13 law, state regulations and also federal law  
14 and regulations that are adopted in 403.088,  
15 403.061(7), 403.067(2)(c). Also in the  
16 memorandum of agreement between the EPA and  
17 DEP, that our program will be implemented in  
18 accordance with federal requirements. Those  
19 MOA pages are D1, D2 and D10.

20 There's also an AGs opinion that is  
21 attached to our response that's a  
22 requirement of delegation in which the  
23 attorney generals have to list a

1 side-by-side table the different parallel  
2 citations for the federal rules and the  
3 state rules and how they are related to each  
4 other. We think that, although you can't  
5 consider federal -- outside of a delegated  
6 program.

7 This particular program is delegated.  
8 It distinguishes it from that Mickasuki  
9 case, from the Lief case. Neither of those  
10 permits were federally delegated permits  
11 subject to the MOU, subject to specific  
12 state legislation where the Florida  
13 legislature has stated that our program will  
14 be implemented in accordance with the  
15 federal Clean Water Act statute and rules.

16 So we think that that is an issue that  
17 should be reserved for the hearing. It's  
18 basically also a matter of fact. That's a  
19 disputed issue of fact in that how can we  
20 show that the water quality is not being  
21 impaired beyond the level of the mixing  
22 zone, if we do not measure water quality  
23 outside that mixing zone.

1           There's a certain number of these  
2           parameters and also parameters for which no  
3           mixing zone has even been granted, such as  
4           nutrients and color foam which will occur  
5           out in the water body.

6           We'll show our experts are of the  
7           opinion that some of the parameters for the  
8           proposed mixing zones will be above state  
9           water quality standards outside the boundary  
10          of that mixing zone.

11          MR. BROWN: So the bottom line is that  
12          you're going to show that they don't have a  
13          monitoring requirement at the edge of the  
14          mixing zone and, therefore, it violates  
15          state law? Have I oversimplified it?

16          MR. BROOKES: Well, it's a little bit  
17          oversimplified but that's the basic idea.

18          THE COURT: Well, I guess it's not  
19          going to take up a lot of time factually.  
20          In other words, you either have a monitoring  
21          requirement at the edge of the mixing zone  
22          or you don't have one. And you're saying  
23          it's a question of law as to whether or not

1           you should have one. Is that a correct --

2           MR. BROOKES: And also that it's a  
3           question of fact as to whether or not the  
4           state water quality standards will be  
5           exceeded at the edge of these mixing zones  
6           or beyond these edges and then how are we  
7           going to find out if they are if there's no  
8           monitoring there.

9           THE COURT: I don't see that allegation  
10          in your paragraph. Maybe you've got it  
11          here. I thought it was just simply a  
12          question of saying the permit shouldn't be  
13          issued because there was not a monitoring  
14          requirement at the edge of the mixing zone.  
15          You're saying it's more complicated than  
16          that?

17          MR. BROOKES: Yes, Your Honor.

18          THE COURT: I'll go ahead and deny,  
19          then, the motion to limit evidence on that  
20          issue in an abundance of caution. So that  
21          would be Paragraph 111. I'll go ahead and  
22          allow evidence on that issue to remain.  
23          Paragraphs 110 and 112, Mr. Brown, you're

1 attempting to exclude or asking that we  
2 exclude evidence regarding a lack of  
3 monitoring standards for dioxin on the  
4 theory that there's no department water  
5 quality standard for dioxin. Ms. Folkes, do  
6 you have a position on that?

7 MR. BROWN: Your Honor, may I elaborate  
8 upon that?

9 THE COURT: Sure.

10 MR. BROWN: This really addresses  
11 Paragraphs, essentially, 110 through 117.  
12 By way of background, it is correct that  
13 Florida has not adopted a water quality  
14 standard in 62-302 for dioxin, also known as  
15 23782CDD. The federal EPA has adopted a  
16 water quality standard for that parameter,  
17 and such an impairment condition is included  
18 in the draft permit for that compound.

19 I wanted to clarify first that the  
20 regulatory basis to require monitoring  
21 explicitly refers to water quality criteria  
22 in 62-302, not in federal law and that's a  
23 straightforward argument.

1 I also wanted to point out another  
2 thing raised by -- our objection to those on  
3 that issue is that under the CLUSTER RULE  
4 related federal rules and related department  
5 rules, there is defined by regulation what's  
6 called a minimum level or a minimum  
7 detection level for testing dioxin of ten  
8 parts per quadrillion. The net result of  
9 that set of rules is that for regulatory  
10 purposes it's been determined that there's  
11 no test that would be able to reliably  
12 determine levels below that concentration.

13 Now, the position set forth in the  
14 petition is that, well, there should be some  
15 other test that would have a greater  
16 sensitivity or would be able to detect  
17 levels below that concentration.

18 MR. BROOKES: That's not our position,  
19 Your Honor. I can explain that later but I  
20 just wanted to state that.

21 MR. BROWN: I just wanted to point out  
22 that was an additional basis on that related  
23 dioxin issue, Your Honor.



1 MR. BROOKES: Your Honor, if I might  
2 address that. We are not saying that the  
3 detection limit is wrong. What we're saying  
4 here is that dioxin is in the effluent and  
5 can accumulate in sediments. Those  
6 sediments should be tested and that ten  
7 parts per quadrillion level can certainly  
8 apply, and we're not saying to get into more  
9 detail there.

10 We're also saying that dioxin can  
11 bio-accumulate in fish. The fish that have  
12 been tested in Rice Creek are parts per  
13 trillion levels, not parts per quadrillion  
14 levels. So those are well above the  
15 detection limits that are set forth in the  
16 standard method 1613 that EPA has adopted.

17 We don't have any quibble with the  
18 detection limit or that method. We agree  
19 that's the appropriate method to use, not  
20 only for water quality standard but also for  
21 sediment numbers and also for fish tissue  
22 numbers.

23 We also state that because Florida did

1 not adopt a timely dioxin standard. The EPA  
2 did adopt a standard expressly for Florida  
3 and that's found in 40-CFR 131.36, toxics  
4 criteria for those states not complying with  
5 Clean Water Act Section 303-C2B.

6 If you go to Paren 6, it states,  
7 "Florida, EPA Region 4, all waters assigned  
8 to the following use classifications of  
9 17301 identified in Florida's Administrative  
10 Code are subject to the criteria contained  
11 in Paragraph D62.

12 If you go to the table, it has that D62  
13 is the dioxin standard. That's the standard  
14 that we agree should apply -- or the  
15 detection limits should apply. It is also  
16 relevant to our challenge to the  
17 administrative order and the compliance  
18 schedule in those statutes and also the  
19 WQBEL statute talks about establishing a  
20 compliance schedule of 90 days. There's  
21 other time frames.

22 If there is a public health threat, the  
23 facts will show that the levels found in the

1 blue gills and sun fish in Rice Creek, in  
2 fact, exceed the levels that are safe for  
3 human consumption and would be at the  
4 no-consumption level. Not one fish per week  
5 or two fish per week, but the no-consumption  
6 level at those parts per trillion levels at  
7 which it's detected.

8 So our contention at the hearing is  
9 that the sampling is inadequate to test in  
10 the sediments and in the fish tissue and to  
11 protect public health impacts as well as the  
12 environment.

13 THE COURT: That's a lot to digest. I  
14 was trying to break this down. This dioxin  
15 argument has quite a few elements into it.  
16 The first time I was bringing it up was  
17 about the lack of monitoring standards for  
18 dioxin and then sampling procedures was  
19 another issue. I was trying to break this  
20 down but --

21 MR. BROOKES: I think we can break it  
22 down, Your Honor, with your indulgence, by  
23 thinking of this in terms of the lack of

1 monitoring required in sediments and the  
2 lack of monitoring required in fish tissue.  
3 I don't think we have trouble or a problem  
4 with the detection limit or the EPA  
5 methodology that's used in the laboratory  
6 for the dioxin test.

7 MR. BROWN: Your Honor, may I respond?

8 THE COURT: Yes, sir.

9 MR. BROWN: The motion was not directed  
10 to allegations, if there are any, in the  
11 petition about fish tissue. We had  
12 specifically objected to any allegation that  
13 there should be some other applicable  
14 detection limit for basically liquid  
15 effluent.

16 Now, as the administrative law judge,  
17 keep in mind this is a permit to discharge  
18 water. This is not a sediment permit and  
19 there is no regulatory program at issue in  
20 here regarding sediment quality. The issue  
21 here is whether Georgia-Pacific complies  
22 with the proposed permit limits on the  
23 effluent of this compound. And we would

1 submit if we comply with that and if there's  
2 no other violation of water quality  
3 criteria, then any of these issues that  
4 Mr. Brookes are alluding to are simply  
5 irrelevant.

6 MS. FOLKES: Your Honor, I read through  
7 Mr. Brookes' response to Mr. Brown's motion.  
8 In going back to the petition -- I'm not  
9 sure. It's kind of hard to determine from  
10 some of these paragraphs exactly what's  
11 being challenged. But there are two points  
12 that I just want to make clear in terms of  
13 state law. Even though EPA has adopted in  
14 the federal regulation the dioxin standard  
15 for the state of Florida, that has not been  
16 adopted under state law. And this is a  
17 state administrative proceeding on a state  
18 issued wastewater permit, which then acts as  
19 the federal permit because EPA has  
20 determined that the way that the state runs  
21 its wastewater program is consistent with  
22 the Clean Water Act.

23 However, under 403051, the department

1 cannot put requirements and conditions in a  
2 permit that do not exist in state law in  
3 either DEP rules or in the statutes that  
4 govern this permit. So I would request that  
5 with regard to the state putting -- in this  
6 state permit, the EPA adopted dioxin  
7 standards; that that be precluded because  
8 it's not a state rule; that the standard is  
9 not adopted by state law.

10 And the second thing is that I agree  
11 with Mr. Brown's previous explanation that  
12 this is a permit to discharge effluent,  
13 which is basically water. And the question  
14 is will this discharge meet state water  
15 quality standards and, therefore, can the  
16 permit be issued? The administrative order  
17 does call for a plan of study from  
18 Georgia-Pacific regarding fish tissue  
19 studies as looking at dioxin, but there is  
20 no regulation that requires that we impose  
21 on them sediment sampling studies.

22 MR. BROWN: Or for that matter fish  
23 tissue studies, Your Honor.

1 MR. BROOKES: Your Honor, if I might  
2 address some of the things that Francine has  
3 brought up. In the Florida statutes the  
4 legislate contemplated seeking delegation of  
5 the federal MPDS permitting process. In  
6 403.0672C they adopt lists including those  
7 303D lists that were submitted prior to the  
8 effective date of this act, and that act was  
9 in 1999 I believe.

10 It also in 403.0617 states that all  
11 effluent limitations shall be consistent  
12 with the provisions of federal law. Further  
13 on it states in the MOA, between the  
14 department and EPA, that the department, the  
15 agency action here that we are seeking  
16 review as a division, is responsible for  
17 issuing, revising, terminating permits in  
18 accordance with the MOU and Parts 40CFR,  
19 Parts 122 to 123 and any other applicable  
20 regulations. And that's found at the  
21 MOAD-TAN at Section 4.

22 This is a commitment of not only the  
23 department but of the Florida legislature to

1       implement the program under 403.0885 (4) and  
2       to operate such a program in accordance with  
3       federal law. The federal law has gone  
4       forward and adopted this requirement  
5       specifically for Florida. So that is an  
6       agency action that we think is worthy of  
7       review.

8               So even though if you are not ruling  
9       directly on federal law you can certainly  
10      make your recommendation as to whether the  
11      agency is meeting its requirements. That it  
12      interpret -- if there is an inconsistent  
13      interpretation with federal law to bring  
14      that to their attention prior to that  
15      becoming final agency action.

16             MS. FOLKES: Your Honor, I would have  
17      to disagree with Mr. Brookes' analysis of  
18      Your Honor's authority in this matter. I do  
19      not think that in an administrative  
20      proceeding wherein you're looking at whether  
21      or not there are reasonable assurances or  
22      some other assurance under a different  
23      statutory frame work, or issuance of this



1 permit and administrative order, that you  
2 have been called upon to decide if this  
3 permit, and maybe even the way the  
4 department is imposing certain limits on  
5 permits of this type, is consistent with its  
6 administration of the federal office assumed  
7 MPDS program.

8 I do believe that in '95 the EPA  
9 decided that the current rules of the  
10 department are consistent with the Clean  
11 Water Act. They did not require at that  
12 time that we adopt this dioxin standard,  
13 which apparently was adopted for Florida in  
14 1992.

15 So in 95 when we received approval of  
16 the state program, EPA did not require that  
17 we adopt that dioxin standard in order for  
18 this program to be run consistent with the  
19 Clean Water Act. But be that as it may, I  
20 do believe that even this line of argument  
21 that we're in is not something that Your  
22 Honor would be looking at.

23 Whether or not we're running the

1 program consistent with the clean water act,  
2 would be a different forum in terms of  
3 looking at those issues. This forum is  
4 simply about whether or not this permit is  
5 going to be properly issued under -- this is  
6 a state wastewater permit issued under  
7 62-320 Florida Administrative Code and other  
8 applicable regulations and state law, and  
9 whether or not this permit is consistent  
10 with those. We are bound by 403051 wherein  
11 we cannot issue a permit unless -- and  
12 impose conditions and limits in there that  
13 have not been adopted in a state rule.

14 MR. BROOKES: Your Honor, I don't think  
15 we need to get to this question. There is  
16 adequate state authority in the statute and  
17 the regs. Simply on this issue in terms of  
18 that the effluent concentration shall be  
19 free from known carcinogens in  
20 concentrations that can have those effects.

21 Here we have an effluent that has  
22 concentrations that we will present evidence  
23 exceed the safe level of consumption for

1 human beings. This gets into some of the  
2 more general narrative public health issues  
3 and narrative standards that are in the  
4 statute 403 and that are also in the  
5 department's rules. They were put there to  
6 protect the public from carcinogens. Now,  
7 dioxin is recognized as, and the testimony  
8 will show, a probable carcinogen.

9 MR. BROWN: Excuse me, Judge. I just  
10 want to make clear before we get to the  
11 hearing -- I just want to make it clear as  
12 to whether or not we consider federal issues  
13 or federal water quality standards as  
14 Mr. Brookes set out at length here in his  
15 response.

16 MR. BROOKES: I have some additional  
17 research on that. I've looked a bit  
18 further.

19 MR. BROWN: My question, Mr. Brookes,  
20 you've set out at length and you may have  
21 some more research, has this argument ever  
22 been accepted -- this position ever been  
23 accepted in any administrative hearing over

1 here or by DEP?

2 MR. BROOKES: This is exactly the point  
3 they've researched. It turns out that when  
4 you look into these cases, the Mickasuki  
5 case, that was under what's called the  
6 Everglades Protection Act. It required a  
7 permit for any surface discharges that would  
8 go to, within or from a EPC or nonEPC  
9 Everglades protection area facility. So  
10 that was a separate state permit.

11 It was not a NPDS discharge permit. It  
12 was not an NPDS discharge permit. It was  
13 not an industrial wastewater discharge  
14 permit. It was under a separate act that  
15 DEP implements called the Everglades Forever  
16 Act in these Everglades protection areas.

17 Subsequent to this decision eventually  
18 one of these structures, S-9, there was a  
19 case by the Mickasuki again as to whether or  
20 not it required an NPDS permit. Originally  
21 they said no. So it went all the way up to  
22 the Eleventh Circuit and they said, yes,  
23 they would require an NPDS permit. That now

1 is just beginning the process so it has not  
2 yet been heard.

3 This is as far as I can find in terms  
4 of District Court of Appeal decisions, the  
5 first instance where we have really  
6 addressed the Florida legislature statutes  
7 that were adopted specifically for receiving  
8 delegation of the program and the first case  
9 that really addresses -- or has presented  
10 before it the MOA that the DEP and the  
11 agency EPA have signed and all attending  
12 documents, including the AG's opinions and  
13 these changes that were made to 403 to  
14 incorporate provisions that our state  
15 program will be operated in accordance with  
16 the federal law. So this is a good case of  
17 first impression for that particular issue.  
18 That's distinguishable.

19 THE COURT: I didn't really get an  
20 answer to my question. I said you've set  
21 out in great depth your argument here. My  
22 question is yes or no. Has this argument  
23 ever been accepted by DEP? Ms. Folkes,

1 maybe you can answer it. Is Mr. Brookes'  
2 contention that you can put requirements in  
3 a permit that don't exist in state law or  
4 that you would have looked at the Clean  
5 Water Act to see whether or not to issue a  
6 state permit? Have those questions ever  
7 been decided or even raised -- well, I  
8 should say decided in Mr. Brookes' favor in  
9 any administrative proceeding that you're  
10 aware of?

11 MS. FOLKES: Not that I'm aware of,  
12 Your Honor. In proceedings in which I have  
13 participated where the issue of whether or  
14 not a condition of a wastewater permit is in  
15 violation of the Clean Water Act. It has  
16 been determined that the ALJ does not have  
17 the authority to look at whether or not the  
18 Clean Water Act is being violated by a state  
19 wastewater permit.

20 Once again, the department's position  
21 is that the current state rules have been  
22 found to comply with the Clean Water Act,  
23 and that the department did not need to

1 adopt this dioxin standard promulgated in  
2 1992 by the EPA in order for the EPA in 1995  
3 to find that the state program was in  
4 compliance with the Clean Water Act.

5 Once again, I go back to the 403051,  
6 which says that, "No limit or condition can  
7 be imposed in this type of permit if it is  
8 not adopted as a rule." The argument then  
9 that we might be in violation of the MOA or  
10 we might be in violation of the Clean Water  
11 Act provisions on how a state should run  
12 MPDS programs, I think that's something that  
13 is -- there's a forum for that where the  
14 petitioners or third parties may go to EPA  
15 and file a petition and challenge the way a  
16 state is running a program under the Clean  
17 Water Act.

18 THE COURT: In the absence of any  
19 authority that's precedent, at least at the  
20 agency level or appellate decisions here in  
21 the state of Florida, I'm going to go ahead  
22 and follow that standard at least in  
23 resolving the issues in this permit. So

1 with that in mind --

2 MS. FOLKES: Your Honor, if I could add  
3 for clarification.

4 THE COURT: Yes, ma'am.

5 MS. FOLKES: Our concern, of course, is  
6 Mr. Brookes bringing up the specific EPA  
7 regulations. He is correct that they are  
8 then -- they are free to present evidence to  
9 try and show that a state rule is being  
10 violated, for example the free-from. I  
11 don't think they would be precluded from  
12 doing that. I just think that they would be  
13 precluded from saying that Your Honor has to  
14 impose this particular number in the permit  
15 because this is what EPA has adopted.

16 THE COURT: Well, in the context of the  
17 way you phrased it the EPA standard is not  
18 relevant but they can raise a contention  
19 that a state rule has been violated. Again,  
20 I need to go back here to Paragraphs 110  
21 through 117 or 114 that speak to the dioxin  
22 levels and sampling procedures.

23 MR. BROOKES: Your Honor, one more



1 further point. The corrected amended  
2 petition does have some additional  
3 information that was discovered during the  
4 discovery process about dioxin in fish in  
5 the Rice Creek and then some --

6 MR. BROWN: We did not finish  
7 hearing -- you may have broken up here but  
8 we did not finish hearing the ALJ's ruling.  
9 I think from my phone your statement came  
10 right in the middle of that, Mr. Brookes.

11 MR. BROOKES: I apologize. I probably  
12 interrupted. I'm very sorry.

13 THE COURT: In the context of the fact  
14 that you can challenge a state rule -- but  
15 we're not going to get into the EPA  
16 standards because they're not relevant here.  
17 I still need to determine which portions of  
18 Paragraphs 110 through I guess it's 117 that  
19 refer to dioxin are relevant and should be  
20 allowed to be considered at the final  
21 hearing.

22 I'm still not clear on this in light of  
23 what we said. I'm trying to break it down

1           so that I can understand it. But in  
2           Paragraphs 110 and 112 Georgia-Pacific has  
3           moved to exclude evidence on monitoring  
4           standards for dioxin because there is no  
5           state water quality standard for dioxin as I  
6           understand it.

7           I think we're back where we were about  
8           20 minutes ago. Mr. Brown, is that  
9           basically what your argument is? I guess  
10          I'm oversimplifying it. I'm not sure.

11          MR. BROWN: I think, in a nutshell,  
12          with respect to that specific subissue  
13          there's simply no regulatory requirement for  
14          the monitoring of dioxin -- and embedded  
15          within that, within the minor issue, we  
16          wanted to make sure that there was no  
17          dispute as to the applicable minimum  
18          detection limit.

19          THE COURT: You're talking about the  
20          EPA standard?

21          MR. BROWN: Yes, Your Honor. It says  
22          that, and in particular I'm referring to the  
23          sentence, "The permit and administrative

1 order should mandate the use of sampling  
2 procedure that will ensure that influent and  
3 effluent samples analyzed for dioxin  
4 compounds will accurately reflect the dioxin  
5 contents of waters being evaluated."

6 Now, even assuming that there was some  
7 regulatory authority to require monitoring  
8 we wanted to assure that there was no issue  
9 of that because the rules dictate what the  
10 sampling procedures are and there simply are  
11 no other alternative sampling procedures  
12 that will lead to that result.

13 So within the broader context of the  
14 argument that there simply is no regulatory  
15 requirement for monitoring dioxin, we had  
16 that subissue.

17 MR. BROOKES: Your Honor, what we're  
18 looking to here is a narrative standard that  
19 incorporates concentrations that's found in  
20 that free-from standard. You know, if we  
21 can show this free-from violation, I'm  
22 thinking here theoretically, there should be  
23 some concentration at which they could put

1           into the permit. Although there's no  
2           expressed numeric standard in the Florida  
3           Water Quality Standards, there is that  
4           narrative free-from standard that could be  
5           incorporated into the permit.

6           THE COURT: Ms. Folkes, do you want to  
7           respond on that? Is that a permissible  
8           condition in a permit? Did you  
9           understand --

10          MS. FOLKES: Your Honor, I got  
11          confused. I think Mr. Brown's argument was  
12          going to the sampling method and then  
13          Mr. Brookes seems to, again, be talking  
14          about imposition of a narrative water  
15          quality standard.

16          MR. BROWN: To clarify the point  
17          Ms. Folkes made, in addition to that  
18          specific subissue regarding sampling  
19          procedures, it is our position that there  
20          simply is no regulatory requirement under a  
21          Florida law that would impose, for that  
22          matter, any monitoring requirement for a  
23          dioxin; keeping in mind that one of the

1 things you're required to have alleged in  
2 your petition is a rule or statute which  
3 requires modification or reversal of agency  
4 action.

5 In this case there is simply no statute  
6 or Florida rule that would require any more  
7 information on or monitoring with respect to  
8 dioxin. In fact, the proposed permit goes  
9 above and beyond what could be legally be  
10 required. Under that situation, it is our  
11 position there simply can be no complaint  
12 about proposed monitoring requirements for  
13 dioxin under Florida law.

14 THE COURT: All right. If there are no  
15 monitoring standards for dioxin in the state  
16 of Florida, then I can't see any relevance  
17 in putting on testimony regarding a lack of  
18 monitoring standards for dioxin or putting  
19 in a standard as a condition in the permit.

20 MR. BROOKES: Your Honor, there's  
21 something in the regulations that says if  
22 there is a --

23 THE COURT: Is it alleged in your

1 petition, just something in the regulations?

2 MR. BROOKES: Yes, Paragraph 113. It  
3 speaks to another narrative standard in  
4 addition to the free-from standard, which we  
5 think is applicable, but also this  
6 biological integrity standard. If we're  
7 finding dioxin in fish tissue, it is also  
8 known to cause impacts in fish. We don't  
9 think that it meets this 62-302.530 cited in  
10 Paragraph 113.

11 MR. COLE: Your Honor, may I respond to  
12 that?

13 THE COURT: Yes, sir, go ahead.

14 MR. COLE: The reference to Florida  
15 Administrative Code 62-302.530 in terms of  
16 biological integrity, I think Mr. Brookes is  
17 aware that has nothing to do with the dioxin  
18 or free-froms. That deals with counting up  
19 almost invisible macroinvertebrates in the  
20 bottoms of rivers. So that provides no  
21 authority whatsoever for the argument on  
22 dioxin that we were just covering.

23 MR. BROOKES: Certainly this is where

1           it starts, Your Honor. The dioxin goes into  
2           these organisms. It's through these filter  
3           feeders. It gets in their tissue and that's  
4           how the bio-accumulation process begins. It  
5           goes from fish -- it even goes from fish to  
6           humans once they consume those fish.

7           MR. COLE: But this rule has nothing to  
8           do with any bio-accumulation issues. It  
9           simply deals with a quantitative counting of  
10          the number of little critters in the bottom  
11          of the stream; not sediments, just these  
12          small organisms.

13          MR. BROOKES: And you will find less  
14          organisms where you find dioxin, Your Honor.

15          THE COURT: Well, I'm going to go ahead  
16          and grant the motion as to Paragraph 110 and  
17          112. I want to make sure that I'm stating  
18          it accurately, if I can find the motion  
19          here. Since there are no monitoring  
20          standards for dioxin, then I'm going to  
21          grant the motion that would exclude any  
22          testimony regarding proposed monitoring  
23          requirements being insufficient. I think

1       that's the way the relief is requested as to  
2       Paragraphs 110 through 112. So to that  
3       extent, I'll go ahead and grant the motion  
4       to exclude evidence.

5               MR. COLE: So then evidence concerning  
6       alleged insufficiencies in the monitoring or  
7       testament that's for dioxin would be  
8       precluded?

9               THE COURT: That's the way you  
10      requested your relief.

11              MR. COLE: Yes, Your Honor.

12              THE COURT: I don't know how narrow  
13      that is but to that extent -- this is an  
14      awfully complicated area here. But I'm  
15      going to go ahead and grant as to -- it's  
16      just not pled clearly enough for me to  
17      understand. I mean, if there are violations  
18      here of a state law it's just not clear in  
19      the pleadings.

20              There has been no allegation that it  
21      violates state law, so I'm going to go ahead  
22      and grant the motion as to Paragraphs 110  
23      and 112 about alleged proposed monitoring



1 requirements being insufficient.

2 In Paragraph 112, Mr. Brown, you've  
3 asked that the issue of monitoring for  
4 dioxin as being inadequate also be excluded  
5 on the grounds there's no state water  
6 quality standard for dioxin in Chapter  
7 62-302. Mr. Brookes, again, I assume you're  
8 relying on the EPA water standard. Is that  
9 correct, sir?

10 MR. BROOKES: We'd be relying also on  
11 the state F.A.C 62.302.500 (1)(a)(5) and  
12 62-302.500 (1)(a)(6); which again is those  
13 first ones, the free-from concentrations  
14 which are carcinogenic. The second one is  
15 those which pose a serious danger to the  
16 public health, safety or welfare.

17 THE COURT: Ms. Folkes, does this fall  
18 within the scope of what you indicated about  
19 the allegation about a state rule may be  
20 violated but an EPA standard is not  
21 relevant?

22 MS. FOLKES: That's correct, Your  
23 Honor.

1 THE COURT: All right. I'll deny the  
2 motion to exclude evidence then on that  
3 particular issue. Paragraph 112, and I'm  
4 trashing the motion to exclude evidence.  
5 It's on Page 11, Paragraph 27B, if I'm not  
6 throwing out too many numbers here.

7 Mr. Brown, you've alleged that any  
8 allegations pertaining to required sampling  
9 procedures relative to dioxin concentrations  
10 of waters be excluded on the theory that  
11 there's only one approved method available?

12 MR. BROWN: Yes, sir.

13 THE COURT: Mr. Brookes, as I  
14 understand it you're not challenging that  
15 particular issue; is that correct? You're  
16 not contending that they only have one  
17 method of EPA dioxin testing?

18 MR. BROOKES: Your Honor, for that  
19 narrow limited thing, no. I think we're in  
20 agreement that that is the EPA methodology  
21 that should be applied. I think they're  
22 saying the same thing but it's not relevant  
23 to a state proceeding, if I'm understanding

1 it.

2 MR. BROWN: In other words, that would  
3 be subsumed within your -- it appears to be  
4 subsumed in your previous rulings with  
5 regard to dioxin and monitoring in any  
6 event, Your Honor.

7 THE COURT: Okay. Finally, we've got  
8 some general allegations in the complaint  
9 regarding points of entry in the future,  
10 future need for a pipeline. Let's see what  
11 else we're talking about here.

12 MR. BROOKES: Where are we looking,  
13 Your Honor?

14 THE COURT: We're looking at your  
15 Paragraphs 114 through 117 of the complaint.

16 MR. BROOKES: Okay. Your Honor, if I  
17 might address this briefly in general. The  
18 concept here is that reasonable assurances  
19 are supposed to be under the case law  
20 provided at the time that the permit is  
21 issued, not later on.

22 Also the fact that these are not  
23 speculative because these compliance

1 schedules are set forth in the AO, which  
2 isn't part of our subject challenge. We are  
3 challenging those things now. This  
4 compliance schedule extends for more than 11  
5 years. The proposed permit can only, under  
6 statutes, be effective for five years. So  
7 that's the kind of thing we're looking at  
8 here.

9 I don't think it's speculative because  
10 it is -- these compliance schedules are not  
11 completely speculative. They're actually  
12 written down and they're part of the  
13 proposed agency action here.

14 THE COURT: What kind of proof were you  
15 talking about putting on here?

16 MR. BROOKES: I think that these are  
17 issues of law perhaps more than fact, but  
18 there are also issues of fact that are  
19 involved in that compliance schedules could  
20 be completed sooner. In fact, we believe  
21 the statutes and regulations require them to  
22 be completed sooner. We also believe that  
23 additional treatment technologies could be

1       used that are not included in the compliance  
2       schedule.

3               We are worried about having points of  
4       entry to come in and challenge these acts of  
5       compliance, these process improvements, the  
6       absence of treatment technologies as we get  
7       into this compliance schedule. Because what  
8       will happen, Your Honor, is that -- we come  
9       in and say -- where's our point of entry to  
10      come and say you haven't used a wetland  
11      treatment system? If not now, it may be  
12      foreclosed for the next 11 years.

13              THE COURT: Well, I guess I don't see  
14      anything in the allegations here about  
15      you're dissatisfied with the completion  
16      dates and you're suggesting different  
17      dates --

18              MR. BROOKES: Let me look back at the  
19      paragraphs exactly.

20              THE COURT: -- or anything like that or  
21      anything about the type of equipment or  
22      improvements that you think that they ought  
23      to use different improvements.

1 MR. BROOKES: Well, I think in  
2 Paragraph 114 we're saying that they haven't  
3 provided reasonable assurance, currently  
4 now, to receive the permit. And basically  
5 the permit has no -- if you look at the  
6 actual permit, it has no effluent  
7 limitations in it for the life of the permit  
8 for the next five years.

9 Those proposed effluent limitations are  
10 for when the pipeline is introduced into the  
11 St. Johns River, which is at a time 11 years  
12 from now, which is beyond the life or  
13 duration of the permit that's allowable.

14 So we're looking at this -- in  
15 Paragraph 114 we're saying the scheme  
16 constitutes an open invitation for  
17 Georgia-Pacific to continue to pollute the  
18 environment in the meantime. Then we talk  
19 about 115, the department not expressly  
20 providing points of entry into this  
21 compliance schedule. Then 116 to 117 I  
22 guess get gets back a little bit more into  
23 dioxin.

1 THE COURT: I'm going to grant the  
2 motion as to 114 and 115. It's so broadly  
3 worded and vague. I don't know if I've got  
4 any authority anyway to say, "DEP give them  
5 points of entry at all points of the  
6 process." I think that's between the agency  
7 and the public. That's the responsibility  
8 they have.

9 I don't see anything in here about your  
10 dissatisfaction with specific aspects of the  
11 equipment or processes or technology that  
12 they're going to use and that others are  
13 more efficient. I'll grant as to 114 and  
14 115. As to 116, we're talking about flaws  
15 that are not identified -- well, there are  
16 some identification of flaws in the dioxin  
17 study.

18 MR. BROWN: Your Honor, I would submit  
19 that based upon, as I understood your  
20 previous ruling, the fact that there simply  
21 is no regulatory requirement to impose  
22 additional monitoring requirements that  
23 these complaints would likewise be

1 foreclosed for the same reasoning.

2 You shouldn't complain about a dioxin  
3 approach or a dioxin monitoring program when  
4 there simply is no statutory or regulatory  
5 basis to modify the proposed agency action.  
6 So for those same reasons we would submit  
7 that those paragraphs should likewise be  
8 foreclosed.

9 MR. BROOKES: Your Honor, I would  
10 simply ask at this point, and I know it may  
11 not be proper for me to ask, if that's the  
12 agency's position. Because I don't know  
13 that the agency would say that there's no  
14 state requirement to monitor for dioxin in  
15 an effluent that contains dioxin.

16 THE COURT: Ms. Folkes, do you have a  
17 position on Paragraphs 116 and 117?

18 MS. FOLKES: Well, Your Honor, the  
19 department is requiring a dioxin study --  
20 I'm sorry, a fish study or that  
21 Georgia-Pacific propose a plan of study for  
22 this issue in the administrative order.  
23 Georgia-Pacific has agreed to accept this.



1 But as to the specifics of how that's going  
2 to be conducted, as Mr. Brown indicated,  
3 there is no regulatory requirement. So I  
4 would have to agree that I don't know what  
5 the petitioners would be raising in terms of  
6 "the dioxin approach."

7 MR. BROOKES: Your Honor, in response I  
8 would say if -- I'm certain the department  
9 would not require a dioxin study if there  
10 was no authority to require such a thing.  
11 Obviously, there is dioxin in the effluent.  
12 There is dioxin in Rice Creek. That gives  
13 rise to the public health section I cited  
14 earlier, the free-from sections. A concern  
15 about that that would go into reasonableness  
16 of whether or not this plan of study  
17 adequately addresses the concern that DEP  
18 has under the authority for which they are  
19 required to style some plan of study.

20 MR. BROWN: Your Honor, may I interject  
21 briefly?

22 THE COURT: Yes, go ahead.

23 MR. BROWN: First of all, there's no

1 allegation in the position that there is  
2 dioxin in the effluent as alleged. There's  
3 no similar allegations of that. I would not  
4 want that issue to go unchallenged. We  
5 would strongly dispute that contention if it  
6 was, in fact, raised in the petition. I  
7 apologize for that interjection but I just  
8 needed to point that out.

9 THE COURT: All right. I'm going to go  
10 ahead and just grant the motion to limit  
11 testimony on these future problems or future  
12 conditions that may be required in 116 and  
13 117. So I'll limit testimony on 114 through  
14 117 as requested in the motion. I had one  
15 other thing. Ms. Folkes, did you ever get  
16 resolved your protective order?

17 MS. FOLKES: Yes, Your Honor. I'm  
18 sorry. I'm in Jacksonville, actually, and I  
19 did intend to file a withdrawal but I would  
20 like to withdraw that motion.

21 THE COURT: Okay.

22 MS. FOLKES: Depositions were held and  
23 myself and Mr. Brookes worked out the

1 documents that were to be produced.

2 THE COURT: Okay. Do we need the court  
3 reporter, Mr. Brookes, for the -- we want to  
4 talk about a few things that we're going to  
5 take up at the hearing; an order of proof  
6 and location, the rules, schedules and so  
7 forth?

8 MR. BROOKES: Just because my memory is  
9 lousy and it's hard for me to take notes and  
10 think at the same time, I would like to just  
11 have her keep going so I can have all this  
12 stuff down.

13 MR. BROWN: Your Honor, if you wouldn't  
14 regard it as inappropriate, I believe that  
15 your rulings on the motion in limine present  
16 additional issues that if we took up now may  
17 greatly increase the efficiency of the final  
18 hearing.

19 THE COURT: Sure. Go ahead.

20 MR. BROWN: One issue is the issue of  
21 the adequacy with respect to dioxin  
22 monitoring is foreclosed, as I understood  
23 that to be your ruling. I do not believe

1           there are any other issues raised in the  
2           petition specifically with respect to  
3           dioxin, because that is a large relatively  
4           complex issue.

5           We would, for purposes of efficiency,  
6           request that evidence regarding dioxin be  
7           precluded in the final hearing. It simply  
8           has not been raised in the petition other  
9           than the monitoring requirements. Because  
10          there's a ruling that there is no regulatory  
11          basis to impose that, then we respectfully  
12          submit that that should be foreclosed so it  
13          would not be necessary to present that  
14          evidence at the final hearing.

15          MR. BROOKES: Your Honor, first of all,  
16          this is supposed to be agency --

17          THE COURT: Let me get Ms. Folkes'  
18          position on that, first of all, and then I  
19          can know whether she's for you or against  
20          you.

21          MR. BROOKES: Okay.

22          THE COURT: Ms. Folkes, do you have a  
23          position on this?

1 MS. FOLKES: Your Honor, I simply don't  
2 recall. But if the petitioners did not even  
3 raise the allegation that the effluent  
4 contains dioxin, the effluent discharge that  
5 is at issue in these proceedings, I would  
6 have to agree with Mr. Brown. However, this  
7 is not based on -- maybe Mr. Brookes can  
8 find in the petition an allegation that  
9 there is dioxin in Georgia Pacific's  
10 effluent but I don't recall there being such  
11 an allegation.

12 MR. BROOKES: Your Honor, first, it's a  
13 matter of procedure. This motion is a  
14 complete surprise in that it's not part of  
15 the motion that was filed. I would like  
16 time to go through that. Also, in the  
17 corrected and amended petition that's been  
18 filed, there is further facts put in there  
19 about information obtained during discovery.

20 Third, and perhaps most overriding, is  
21 that this proceeding is under Chapter 120.  
22 It's supposed to be an opportunity for the  
23 public to have input into the agency

1 decision-making process before the agency  
2 takes proposed final action, especially with  
3 regard to matters that can impact public  
4 health. Dioxin is relevant to state  
5 standards; as we talked about before, the  
6 free-from and the public health criteria.

7 For that reason, I think it would be  
8 relevant at the hearing and to this permit  
9 to discuss or have testimony regarding that.  
10 If it's in the permit -- there had to be  
11 some reason to put a dioxin standard in  
12 there and some state authority. I think the  
13 DEP has agreed that it may be relevant under  
14 free-from and public health. Those have  
15 been expressly included in the corrected  
16 amended petition, so they will come up prior  
17 to hearing. We'll at least have a hearing  
18 on that motion and that amended corrected  
19 petition.

20 We've been through the original  
21 petition that has been filed and that had  
22 these different dioxin paragraphs in it.  
23 Let me get those in front of me.

1                   We have alleged there should be  
2                   sampling procedures that will ensure that  
3                   the influent and effluent samples analyzed  
4                   for dioxin compounds will accurately reflect  
5                   the dioxin contents of the water being  
6                   evaluated, and that's talking about dioxin  
7                   being in the effluent.

8                   THE COURT:   What paragraph is that,  
9                   sir?

10                  MR. BROOKES:   Paragraph 12.

11                  THE COURT:   112 or 12?

12                  MR. BROOKES:   I'm sorry.   You're  
13                  correct, Paragraph 112.

14                  THE COURT:   Well, that's just simply  
15                  arguing that -- well, I'm just trying to  
16                  think.   This paragraph here, we've already  
17                  ruled that the lack of -- there would be no  
18                  testimony on lack of sampling procedures for  
19                  dioxin.

20                  MR. BROOKES:   Well, Your Honor, there  
21                  will be testimony that at low flow  
22                  conditions the effluent from Georgia-Pacific  
23                  makes up 97 percent of the Rice Creek River

1 flow. There's also going to be evidence  
2 that dioxins have been found in  
3 concentrations that exceed public health  
4 advisory levels for dioxin in fish. This is  
5 certainly something that should be addressed  
6 in the permit as a potential public health  
7 threat.

8 THE COURT: Is there an allegation in  
9 here, though, about dioxin being in the --  
10 not the lack of dioxin sampling procedures  
11 or monitoring devices, but is there any  
12 allegation in the complaint about dioxin  
13 being present in the effluent that's going  
14 to be discharged into the creek? Is there a  
15 specific allegation? Not in the amended --

16 MR. BROOKES: Yes. Paragraph 92 of the  
17 original it states, "Dioxin relating to  
18 Georgia-Pacific is clearly a substance that  
19 can be emitted by Georgia-Pacific," below  
20 the applicable detection limit, which you've  
21 kind of stricken, "while still being present  
22 in the ambient water in harmful quantities."

23 MR. KEYSER: I believe Paragraphs 86



1 and 87 also go to that issue.

2 MR. BROOKES: "Dioxin is likely  
3 associated with the total organic carbon  
4 within the massive amounts of total  
5 suspended solids emitted by  
6 Georgia-Pacific." That's correct, Your  
7 Honor. It's right there. It's very clear  
8 there.

9 MR. BROWN: But, Your Honor, none of  
10 these paragraph are tied to any legally  
11 enforceable regulatory requirement. Again,  
12 Paragraphs 86 and 87 are devoid of any  
13 reference to any applicable water quality  
14 standard or proposed effluent requirement.

15 MR. BROOKES: That's in Paragraph 92.  
16 Citing the free-from rule 62-302.530(62) and  
17 also this other 62-302.500 (1)(a)(1) and 3.  
18 That's right there in Paragraph 92 clearly.  
19 So if you combine 86 and 92 that should get  
20 us there.

21 MR. BROWN: Your Honor, Paragraph 92  
22 again raises the question about the  
23 applicable detection limit, which I

1       understood Mr. Brookes conceded as a  
2       nonissue. Now, this paragraph does not  
3       allege that there will be a violation of  
4       that proposed effluent in the permit even if  
5       there was a regulatory basis to require  
6       that. This only alleges that, well, there's  
7       a possibility that it could be below the  
8       detection limit. We submit, again, because  
9       that issue has been foreclosed. There's  
10      simply no regulatory basis to address dioxin  
11      even under the context of those allegations.

12           MR. BROOKES: Your Honor, the second  
13      sentence of Paragraph 86, which Tim Keyser  
14      did not read, states, "Pulp and paper mills  
15      using chlorine-related compounds in their  
16      production process are known to produce  
17      dioxin." This facility uses  
18      chlorine-related compounds. It's a pulp and  
19      paper mill and it it's been known to produce  
20      dioxin. This is a pro se petition, I  
21      believe at that time --

22           MR. BROWN: It was actually prepared by  
23      Steven Medina.

1 MR. BROOKES: I think that this  
2 petition seems to address the issues pretty  
3 closely, Your Honor, and the corrected  
4 amended petition can address them even more  
5 specifically. I know that these things are  
6 at issue.

7 This certainly is a valid, very serious  
8 public health issue as well as the free-from  
9 issue. This is what the state  
10 administrative process is for, to bring  
11 these types of concerns that affect the  
12 public and affect petitioners, like  
13 Mr. Keyser's clients, who fish that river  
14 and should be given some forum to be talked  
15 about with allegations such as Paragraph 82  
16 and 86 and 92. We can be -- we're only  
17 supposed to have to allege the ultimate  
18 facts. You know, general allegations of  
19 ultimate facts. We've put in 92 even  
20 sections to specific subsections of the  
21 Florida rules. I think that this should be  
22 considered adequate to get to this issue.

23 THE COURT: How much --

1 MS. FOLKES: Your Honor.

2 THE COURT: Yes, Ms. Folkes. Go ahead.

3 MS. FOLKES: I missed the first part of  
4 what Mr. Keyser said but I assumed he was --  
5 was he pointing Your Honor to the first  
6 sentence of Paragraph 86?

7 THE COURT: That is correct.

8 MS. FOLKES: It does say that, "dioxin  
9 is likely associated with total organic  
10 carbon within the massive amounts of total  
11 suspended solids emitted by  
12 Georgia-Pacific." Then it goes on to talk  
13 about dioxin in the environment. Although  
14 that does not specifically say dioxin is in  
15 GP effluent, that could be interpreted to  
16 say that the petitioner has raised the issue  
17 of whether or not Georgia-Pacific's effluent  
18 contains dioxin which may be harmful.

19 THE COURT: How much time and effort  
20 are we going to be spending on this issue in  
21 terms of your witnesses, Mr. Brown?

22 MR. BROWN: Mr. Cole, can you address  
23 that?

1 MR. COLE: Yes. Part of it will relate  
2 to do we get into all types of alternative  
3 technologies or even alternative ways of  
4 making paper. If we get into those types of  
5 issues, we are looking at probably four  
6 witnesses with extensive testimony that's  
7 limited solely to the question of what is in  
8 the effluent, if any. Because it's in there  
9 doesn't mean, obviously, we agree with their  
10 statements. That's only their allegation.  
11 If they do that, we would probably have two  
12 witnesses that would provide extensive  
13 expert testimony relating to that question.

14 THE COURT: That is the issue I  
15 understood they were raising. Mr. Brookes,  
16 that's what you're saying, isn't it, sir,  
17 just the narrow issue of whether or not  
18 dioxin is found in the effluent?

19 MR. BROOKES: Yes, Your Honor. If you  
20 look at Footnote 1 of Paragraph 86, we spell  
21 out in there that Georgia-Pacific has not  
22 shown reasonable assurance with respect to  
23 organic chlorines which is dioxins.

1           We think that if we show that it is  
2           present and it is causing a violation of the  
3           free-from or public health criteria, then it  
4           really is the applicant's burden perhaps to  
5           have to get into whether they have to shut  
6           down, that may not even be relevant, or  
7           whether there's any other ways of making  
8           paper. I think what we're talking about  
9           here is whether they're violating those two  
10          particular rules.

11           THE COURT: All right. I'll go ahead  
12          and allow testimony on that narrow issue  
13          then. Mr. Brown, do you have any other  
14          things you need to take up or further  
15          clarification on that?

16           MR. BROWN: Could you clarify what that  
17          narrow issue is? Is that simply the actual  
18          contents of the Georgia-Pacific's effluent?  
19          Is that the issue that you're allowing?

20           MR. BROOKES: I think it would be more  
21          about anything relevant to the free-from  
22          standard or the public health standards  
23          cited in the briefs.

1 MR. BROWN: Your Honor, again, this  
2 goes back to the point that we're regulating  
3 effluent. As we were trying to present, if  
4 that's the issue, then that's a relatively  
5 narrow and concrete issue. But we would  
6 submit this additional evidence about fish  
7 tissue and sediment and so forth, and the  
8 parade of horrors they're trying to put  
9 forth is, A, irrelevant and, B, we would ask  
10 that be excluded because it would again  
11 require a substantial portion of time in the  
12 final hearing.

13 So we would request that that issue be  
14 limited to the actual alleged effluent  
15 concentrations of dioxin, which is what is  
16 being regulated in this permit.

17 THE COURT: Mr. Brookes, do you have  
18 witnesses on that area, that subject?

19 MR. BROOKES: We'll be talking about  
20 whether it meets the -- whether it's in  
21 violation of the free-from standard and the  
22 public health standard, those two  
23 regulations we've talked about, and that

1 encompasses a bit more than what Mr. Brown  
2 is alleging.

3 "A parade of horrors" is not perhaps  
4 a good term. These things are state  
5 regulations, state requirements. We should  
6 be allowed to get into free-from and public  
7 health regulations that are contained in the  
8 applicable regulations here.

9 THE COURT: Where are these pled at?

10 MR. BROOKES: Well, again, we can start  
11 with Paragraph 92. "In concentrations which  
12 injure, are chronically toxic to, or produce  
13 adverse physiological or behavioral response  
14 in humans or animals," in violation of Rule  
15 62-302.530(62). There's also this nuisance  
16 standard, 62-302.500 (1)(a)(1) and 3.  
17 There's also in Paragraph 93, "in  
18 concentrations which are carcinogenic,"  
19 under 62-302,500 (1)(a)(5) or "pose a  
20 serious danger to public health, safety or  
21 welfare," in Paragraph 93. Citing F.A.C.  
22 62-302.500 (1)(a)(6).

23 THE COURT: All right. It looks to me



1       like it's arguably pled in there, Mr. Brown.  
2       So I guess it will include also the  
3       free-from standard and the public health  
4       standards that we're talking about in  
5       Paragraphs 92 and 93.

6               MR. BROWN: Yes, Your Honor. There is  
7       one other similar issue that -- I don't want  
8       to take up too much of your time -- I think  
9       may resolve some matters at final hearing.  
10       We've had some discussion, argument as to  
11       the degree to which you would have authority  
12       to impose specific upgrades or process  
13       changes at the Georgia-Pacific mill.

14              I think that one issue that you've  
15       framed in today's discussion is that there  
16       is no allegation in the petition that  
17       Georgia-Pacific should be required to  
18       undertake specific upgrades, and there is no  
19       regulatory basis existing or pled in the  
20       petition that would require such upgrades.

21              So we would submit, and we believe this  
22       would substantially reduce the necessary  
23       hearing time, that evidence regarding

1 additional process changes or upgrades  
2 should be foreclosed at the final hearing.

3 MR. BROOKES: Your Honor, in brief  
4 response, we would like time to give you a  
5 reply in writing to that particular one.  
6 Off the top of my head, there is that  
7 403.0885, I think, that gives the authority  
8 to enter into one of these administrative  
9 orders. There is language in there that  
10 talks about whether -- if there are  
11 additional treatment technologies, whether  
12 those should be used and required in the  
13 compliance schedule in order to bring the  
14 effluent into compliance with water quality  
15 standards at the point of discharge before  
16 they allow 11 years in which to bring the  
17 property into compliance.

18 THE COURT: Ms. Folkes, do you view my  
19 role in the case as having the authority to  
20 make changes, upgrades, process changes and  
21 so forth or is it to view the system as  
22 proposed by the applicant and go with that  
23 either yea or nay?

1 MS. FOLKES: The last part of your  
2 comment, Your Honor, that whatever the  
3 applicant has proposed to the department and  
4 the department has seen as reasonable to put  
5 in the administrative order is what's before  
6 Your Honor. I do not think it will, and  
7 like you said, yield for a yea or a nay to  
8 that. Ultimate or different treatment  
9 technologies that the petitioners' experts  
10 may propose, I don't think Your Honor has  
11 the authority to then have Georgia-Pacific  
12 do those.

13 THE COURT: All right. I'm going to --

14 MR. BROOKES: Your Honor, before you  
15 rule, briefly just one additional point.  
16 The issue should be whether -- there's a  
17 kind of step-process here. The applicant  
18 has to show that they've provided reasonable  
19 assurance that they've done everything  
20 possible. If you find that even with those  
21 things they still don't meet water quality  
22 standards for the duration of the permit  
23 those next five years, I believe that you

1 have to recommend denial of the permit.

2           However, under Florida Statutes 120 if  
3 you recommend denial of the permit because  
4 even with these improvements they still  
5 can't meet state water quality standards,  
6 there is a section in there that says that  
7 you are empowered to recommend conditions or  
8 changes that might allow for the issuance of  
9 the permit; not as written or as proposed,  
10 but with these additional conditions.

11           Some of those conditions might  
12 involve -- not specifically saying a  
13 particular technology but something about  
14 looking into those or setting up -- you  
15 know, when you basically remand the  
16 application back saying, "You need to look  
17 at these additional things." If there was a  
18 recommended order of denial, and in the  
19 conditions that you would recommend that may  
20 result in issuance of the permit, it should  
21 be looked into further.

22           MR. KEYSER: Judge, I would like to  
23 make a comment.

1 THE COURT: Yes. Go ahead, sir.

2 MR. BROWN: I have a witness that's  
3 going to testify that reasonable assurances  
4 haven't been provided. Because there is  
5 existing feasible technology and  
6 construction that could have been utilized  
7 that wasn't that would eliminate a lot of  
8 the pollutants that will be discharged  
9 through the pipeline.

10 MR. BROOKES: Your Honor, some of these  
11 technologies are used at other paper mills  
12 in Florida.

13 MR. KEYSER: So that goes right to the  
14 issue of reasonable assurance.

15 MS. FOLKES: Your Honor, I guess one of  
16 the problems I'm having, even with this  
17 discourse, is that we are in a situation  
18 where we -- this proceeding is about a  
19 current proposed permit and administrative  
20 order under Chapter 403.0882 (e), I believe  
21 is the subparagraph, where it is  
22 acknowledged that currently there is not  
23 reasonable assurance at some level. That is

1        why an administrative order with a  
2        compliance schedule is part of this process.

3                There are four criteria in there for  
4        whether or not an administrative order and  
5        compliance schedule can be issued to an  
6        applicant. And then one of the things Your  
7        Honor looks at is whether or not their  
8        proposal for pollution abatement procedures  
9        or instillation of certain equipment and the  
10       schedule for compliance, eventually with  
11       water quality standards, is reasonable.

12               Once again, I think Your Honor  
13       already -- you put it so simply. That you  
14       are going to look at what the applicant has  
15       proposed as their pollution abatement  
16       proposals and the studies that are in the  
17       AO, and whether or not that is reasonable  
18       and meets the requirements of 403.0882 (e).

19               I do not think that the department  
20       ultimately, because Your Honor will make the  
21       recommendation back to the secretary, has  
22       the authority to go into the mill and tell  
23       Georgia-Pacific to put this certain

1 pollution abatement equipment versus another  
2 type.

3 Your Honor is perfectly free to  
4 entertain testimony about the different  
5 types and how they work and if one is better  
6 than the other. But I don't think  
7 ultimately that a final order can actually  
8 say to Georgia-Pacific, Do "X" instead of  
9 "Y." You can simply say that your proposal  
10 "X" is not reasonable.

11 THE COURT: That's my understanding and  
12 the way we've always done environmental  
13 permits or any type of permit of that sort.  
14 I'm going to go with the proposition I  
15 originally stated. We're going to look at  
16 the proposal by Georgia-Pacific. If it  
17 satisfies the requirements of the statute,  
18 then it would get a favorable decision. If  
19 it doesn't, it won't.

20 Mr. Keyser, in terms of your witness,  
21 if he's competent enough to -- has the  
22 expertise to express opinions about  
23 different technologies, then he would

1           certainly have the competence to express an  
2           opinion what they propose will not work and  
3           the reasons why.

4           But in terms of other technologies, I  
5           don't have any authority, I don't think, to  
6           say they should have done this instead of  
7           this and therefore I recommend that they do  
8           this, et cetera, et cetera. I'm going to go  
9           ahead and limit the testimony in that  
10          respect. I would assume that your witness  
11          would be able to tailor his testimony to  
12          those constraints.

13          Were there any other matters we needed  
14          to take up before we get into some basic  
15          things about the hearing?

16          MR. BROWN: Unless Mr. Cole disagrees,  
17          Georgia-Pacific has no further matters to  
18          bring before the prehearing matters.

19          THE COURT: Anyone else?

20          (No response.)

21          THE COURT: All right. Let's see if we  
22          can run through this real quickly. I don't  
23          have a prehearing --



1 MR. BROOKES: Your Honor, I have that  
2 motion to file the corrected amended  
3 petition. I don't know whether we could  
4 talk now about possibly a time to hear that.

5 THE COURT: When was that filed? Was  
6 that submitted today?

7 MR. BROOKES: Last night and then -- or  
8 yesterday afternoon and then I was able to  
9 send it to Jeff. Because I'm traveling in  
10 between Mississippi to Alabama, I was able  
11 to send it early this morning. I've yet to  
12 talk to him. He may not have even a legible  
13 copy, I think he said, so I may have to  
14 refax it to him. So he will need some time,  
15 I imagine.

16 THE COURT: Will y'all be available  
17 sometime, say, Friday afternoon or Friday  
18 morning?

19 MR. BROOKES: Friday morning is better  
20 for me.

21 THE COURT: Is that going to give the  
22 parties time to respond? Ms. Folkes,  
23 Mr. Brown, either one.

1 MR. BROWN: That would be extremely  
2 difficult, Your Honor. I think both  
3 Mr. Cole and I are booked up pretty much  
4 full-time during that period. Mr. Cole,  
5 what are your thoughts on that?

6 MR. COLE: I guess we'll do what the  
7 Judge says. I had a whole series of  
8 meetings set up with witnesses on witnesses  
9 preps and stuff.

10 MR. BROOKES: Your Honor, we may not  
11 even need to have oral argument on it.  
12 Perhaps I jumped the gun. Perhaps we could  
13 just have the ALJ rule from the bench. I  
14 know that sometimes the ALJs will rule  
15 without having oral argument. In fact, I  
16 think in the administrative procedure book  
17 that the Bar puts out it says that's usually  
18 the matter of course.

19 THE COURT: I'll tell you what, why  
20 don't we just take it up Monday at the  
21 outset of the hearing. We'll set aside a  
22 few minutes for that.

23 MR. BROOKES: Thank you, Your Honor.

1 THE COURT: In terms of order of proof  
2 at the hearing, I don't think there's any  
3 dispute. I guess we'll have the  
4 applicants -- the agency will go first,  
5 followed by the petitioners and then a  
6 rebuttal for the applicant and the agency.  
7 I guess there's no dispute over that; is  
8 that correct?

9 MR. BROWN: We were planning to do  
10 that, Your Honor. I've had it work both  
11 ways. The department expressed that  
12 preference and it was fine with us. We'll  
13 be prepared to lead off.

14 THE COURT: Is the rule going to be  
15 invoked, by any chance?

16 MR. BROOKES: Before we leave that  
17 first one -- I'm sorry. It was just a  
18 little quick for me. It's the applicant  
19 will go first and then the agency will go  
20 and then the petitioners will go, both Tim  
21 Keyser and myself?

22 THE COURT: Yes, sir.

23 MR. BROOKES: And then rebuttal for the

1 applicant and the agency or just the  
2 applicant?

3 THE COURT: Either or both.

4 MR. BROOKES: And no surrebuttal? If  
5 we have a rebuttal witness, where will we  
6 put our rebuttal witness in?

7 THE COURT: During your case.

8 MR. BROOKES: Okay.

9 MR. KEYSER: Could the applicant and  
10 agency give an estimate of time how long  
11 their case will take?

12 MR. BROWN: Yes. In fact, that's  
13 something we were going to suggest. I think  
14 that we're going to attempt to finish up --  
15 which would include some of the agency  
16 personnel that we're planning to call, which  
17 probably would be joint so that they don't  
18 have to come back. Francine and I really  
19 haven't discussed that. Two agency  
20 personnel, which would probably be included  
21 in DEP's case, would probably go to  
22 Thursday.

23 THE COURT: In other words, you can

1 finish up your entire case in chief by  
2 Thursday, you think?

3 MR. BROWN: That is our objective, Your  
4 Honor.

5 MS. FOLKES: Your Honor, I actually  
6 thought that that might be the case. Even  
7 with Mr. Cole calling two of the  
8 department's witnesses, that would leave me  
9 with three or four of my own. I had planned  
10 that the department's case would probably  
11 take up Friday and Monday.

12 MR. BROWN: Your Honor, there is no  
13 first Friday.

14 THE COURT: Right. I'm not going to be  
15 available on the first Friday.

16 MS. FOLKES: Oh, there isn't?

17 THE COURT: No, ma'am.

18 MS. FOLKES: Oh, I'm sorry.

19 THE COURT: Let's see. So the  
20 applicant and agency we'll take through  
21 Thursday evening to conclude their cases in  
22 chief. So I would assume, Mr. Keyser, that  
23 would indicate y'all don't need any

1 witnesses until next Monday?

2 MR. KEYSER: I thought the agency would  
3 need two more days after the applicant.

4 THE COURT: Well, I'm saying at a  
5 minimum I don't think you're going to need  
6 your witnesses until next Monday.

7 MR. KEYSER: Okay.

8 THE COURT: But a week beginning on the  
9 25th, if that will give you any assistance.

10 MR. KEYSER: That's a big help. Yes.

11 MR. BROWN: Your Honor, the other thing  
12 I wanted to suggest and offer to the other  
13 parties too, that if -- I know that they,  
14 like we, have some very busy witnesses. If  
15 we need to work in witnesses -- because I  
16 know both we and they have, for instance,  
17 professors or governmental employees that  
18 they need to work in -- I would like to  
19 indicate flexibility to try to accommodate  
20 witnesses as best we can, particularly as  
21 the hearing goes on. I know it's more  
22 difficult for them than it is for us, since  
23 we're first, in terms of anticipating.

1       Although, we obviously don't know how long a  
2       cross-examination will take.

3               But I would like to indicate on our  
4       part if there are witness' needs in terms of  
5       fitting their schedules, we're flexible to  
6       work with the other parties on trying to fit  
7       those in if they are running into problems  
8       of unavailability or some pretty good  
9       inconvenience on the part of them.

10              MR. BROOKES: Your Honor, we have no  
11       objection to taking any witnesses out of  
12       order for the convenience of the witnesses.  
13       In fact, also, if there's a witness that's  
14       called and then rather than have them go  
15       back to their offices and have to come back  
16       a second day, if we want to get them all  
17       finished by going through them in direct for  
18       all the different parties that are calling  
19       them, that might be fine, too. We don't  
20       object to that either. I think that helps  
21       out and we're not in front of a jury and  
22       it's easy to follow.

23              MR. BROWN: And kind of related to

1       that, the one other thing I would suggest --  
2       and again, this probably will help  
3       petitioners more than us to start off with,  
4       but I would like to suggest that we each  
5       indicate who we anticipate calling a  
6       particular date. Do it like at the end of  
7       the previous day so that we each have time  
8       to prepare for our documents that we may use  
9       for that or petitioners may use for that.

10           I think it's a little more efficient if  
11       we do that. We're willing to do that if the  
12       other parties are willing to, and we would  
13       give advance notice prior to Monday of who  
14       we anticipate to be up that day so that  
15       counsel could be prepared with any documents  
16       for cross-examination or consulting with  
17       their witnesses on cross-examination.

18           MR. BROOKES: I think that would be an  
19       excellent idea. We'll do that, too.

20           MR. KEYSER: Judge, I have a question  
21       for the other parties. Is our standing  
22       going to be challenged? Do I need to call  
23       witnesses on that or are you going to accept



1 our standing?

2 THE COURT: I don't know whether y'all  
3 have stipulated to it or not. I haven't  
4 seen a prehearing stipulation. Is there  
5 going to be a prehearing stip filed in this  
6 case?

7 MR. BROWN: That was one of the issues  
8 we wanted to address.

9 MR. BROOKES: I've started working on a  
10 draft that Francine sent me and I can send  
11 that once I can plug my commuter in here.

12 MR. BROWN: Your Honor, I don't know  
13 how -- we have provided our information to  
14 Ms. Folkes; if not all, virtually all of it.  
15 We don't know logistically if the parties  
16 are going to be able to convene to execute  
17 it. Would you prefer separate prehearing  
18 statements by a particular date or what  
19 would your preference on that?

20 MR. BROOKES: Your Honor, because I'm  
21 traveling and I'm stuck away from my office,  
22 if it would be okay, maybe we could submit  
23 our -- I think that you're allowed to file

1 the unilateral ones or have us file it. We  
2 may have to file it separately.

3 THE COURT: All right. If you file it  
4 separately, then that's fine with me. But  
5 take into account, if you can recollect  
6 what's happening this morning on the motion  
7 to limit issues, of what's taken place and  
8 eliminate some of these issues that we've  
9 gotten rid of this morning.

10 MR. BROOKES: Your Honor, I might have  
11 to put like a boldface thing just with  
12 brackets. Something that just says proffer  
13 or something like that.

14 THE COURT: Okay.

15 MR. BROOKES: There's some things I may  
16 be able to just proffer by handing you some  
17 documents. The other ones might only take a  
18 few questions. I will try not to take up  
19 very much time with it and try to narrow it  
20 right down to only the exact questions I  
21 need.

22 THE COURT: All right. And in terms of  
23 Mr. Keyser's question -- I don't know,

1 Mr. Keyser, if you can get a stipulation  
2 from DEP and Georgia Pacific on standing,  
3 that's fine with me; but if you can't, then  
4 I would assume you'll need to have somebody  
5 there to establish standing.

6 MR. KEYSER: Okay.

7 THE COURT: Is the rule going to be  
8 invoked by any party?

9 MR. BROWN: Your Honor, I think it  
10 makes -- it doesn't make sense in this case  
11 when we're dealing primarily with experts.  
12 We know most of their opinions. So I would  
13 suggest that we do not invoke it, even  
14 though I'm the one going first and probably  
15 would benefit the most from doing so.

16 MR. BROOKES: Let me just say, on  
17 behalf of my petitioner, we won't invoke the  
18 rule. I think it makes it a nicer hearing  
19 and it's a little bit easier for the  
20 witnesses when they come all this way to not  
21 have to stand out in the hallway when they'd  
22 rather be listening.

23 MR. BROWN: I concur with that, Your

1 Honor.

2 THE COURT: Okay. Anything else any  
3 party can think of?

4 MR. BROWN: Just maybe two or three  
5 other items.

6 THE COURT: Okay.

7 MR. BROWN: In terms of exhibit  
8 numbering, as to your preference -- because  
9 I know I've been in some of these where  
10 there was a preference by the judge and we'd  
11 numbered them wrong -- do you have a  
12 preference? We were thinking we would  
13 number ours like Georgia-Pacific 1, 2, 3, 4  
14 and 5 and so on.

15 THE COURT: That will be fine.

16 MR. BROWN: Other parties would do  
17 likewise as to their status.

18 THE COURT: That will be fine.

19 MR. BROWN: Your Honor, we've  
20 prelabelled the numbers and I would hope  
21 that Your Honor would not mind if, for  
22 example, we wanted to submit Exhibit 25  
23 before exhibit labeled 1 would be introduced

1 and that we wouldn't be required to renumber  
2 them.

3 THE COURT: No problem.

4 MS. FOLKES: Your Honor, I was going to  
5 ask if Your Honor would do it that way  
6 because then the parties have exchanged  
7 preliminary exhibit lists. Although, I do  
8 think that Mr. Brookes needs to update the  
9 list that was provided by Petitioner Young  
10 because there are duplications and sections  
11 missing.

12 MR. BROOKES: Okay. I will take a look  
13 at it. I think it's done, Francine. I just  
14 have to be able to get to e-mail to send it  
15 to you.

16 MS. FOLKES: Okay. I'm sorry. I need  
17 to backup a little bit. Did Your Honor say  
18 that Friday, February 22, we weren't going  
19 to have a hearing?

20 THE COURT: That is correct. I've had  
21 something come up. I'm going to have to be  
22 back here in town on the 22nd. So we'll  
23 start at 12:30 on Monday and run through

1 Thursday as late as they'll let us keep the  
2 room, and we'll picked a starting time for  
3 the following Monday over there next week.

4 MR. BROOKES: We're at City Hall in the  
5 City of Jacksonville, right?

6 THE COURT: Yes. The new City Hall,  
7 not the old one.

8 MR. BROOKES: Oh. Good thing you told  
9 me. Okay.

10 MS. FOLKES: The address is correct,  
11 Your Honor, 116 West Duval Street?

12 THE COURT: Yes. It's about a  
13 four-story building. It's a brand new one,  
14 too.

15 MS. FOLKES: That's what I told all the  
16 witnesses. I just wanted to make sure.

17 THE COURT: And there's a parking  
18 garage right across the street that probably  
19 would be the easiest to get into.

20 MS. FOLKES: Your Honor, I did send out  
21 a very rough draft of a prehearing  
22 stipulation. But based on everyone's  
23 schedule and that you're inclined to accept

1       that they be filed separately, I would  
2       request the parties at least file their  
3       unilateral with the same framework that I  
4       outlined.

5               It will be easier for Your Honor to --  
6       you're going to have, I think, four  
7       separately filed prehearing statements. If  
8       we all keep at least within the same  
9       framework, it will be easier for Your Honor  
10      to quickly read through those.

11             MR. BROOKES: I would agree to that,  
12      and I've been working on the template you  
13      sent.

14             MR. BROWN: Yes. We appreciate your  
15      taking the initiative to do that,  
16      Ms. Folkes. Just a couple of other  
17      questions, Your Honor. I think you said we  
18      were going to start, and your order said, at  
19      12:30 on Monday.

20             THE COURT: Right.

21             MR. BROWN: At one point we had talked  
22      about starting at 9:00. I'm not attempting  
23      to argue the point either way. I just

1 wanted to make sure we were there at the  
2 appropriate time.

3 THE COURT: Yes, sir. 12:30 is fine  
4 with me, unless y'all want to get started  
5 earlier. But I think there may be some  
6 people, witnesses, whatever, that are going  
7 to need to drive over and that would give  
8 them time in the morning. Although, I  
9 expect counsel may already be over there.  
10 But 12:30 is fine with me, unless you all  
11 have got --

12 MR. BROWN: That's fine with me, Your  
13 Honor. I just wanted to check.

14 MS. FOLKES: If we do decide on an  
15 earlier time period, could it be 10:00? The  
16 reason being that because it was going to  
17 start at 12:30. I already have a telephone  
18 hearing scheduled with Judge Gonzalez for  
19 Monday morning which would run into a  
20 nine o'clock start time for this hearing.

21 THE COURT: Let's just stick with  
22 12:30, if that's okay with all counsel.

23 MR. BROWN: That's fine with us, Your



1 Honor.

2 MS. FOLKES: That's fine, Your Honor.

3 MR. BROOKES: That's fine, Your Honor.

4 MR. BROWN: I know that we may vary the  
5 time somewhat and I think you said we're  
6 going to start at 9:00 each day. Just in  
7 terms of witnesses and what we're telling  
8 them in terms of plane schedules out and  
9 stuff, normally what would you want to go to  
10 in the afternoon, Your Honor?

11 THE COURT: Probably 5:00 or 6:00,  
12 depending on when we -- sometimes I hate to  
13 interrupt the witness. I'd rather finish a  
14 witness up late in the afternoon even if it  
15 runs until 6:00, 6:30. I don't know if  
16 there's any problem staying in this facility  
17 after 5:00. I don't think there is because  
18 I'm sure they have security there. I'm sort  
19 of flexible on that. But if we've had a  
20 full day, 5:00 or 5:30 is a good breaking  
21 point for everybody I think. Unless we're  
22 right in the middle of a witness and we  
23 think we can finish them up and get them out

1 of town or through with them.

2 MR. BROWN: On a court reporter, are we  
3 using a Division of Administrative Hearing's  
4 court reporter?

5 THE COURT: No, sir. It should be  
6 someone the agency is going to provide.

7 MS. FOLKES: Yes. That's correct, Your  
8 Honor. The agency will be providing the  
9 court reporter.

10 MR. BROWN: One other question. In  
11 terms of the exhibits, one of the things  
12 that -- and I'm not -- Ralph, we probably  
13 should have chatted this ahead of time.  
14 Sometimes it's helpful if we would each put  
15 together a notebook of our exhibits that are  
16 labeled for both the ALJ and the other  
17 parties. I don't have a problem doing that,  
18 if you all would prefer; and if you prefer  
19 not to, I certainly wouldn't push that.

20 MR. BROOKES: I'm not sure what you're  
21 asking, but I've got so many boxes that I  
22 couldn't fit them in a notebook. Are you  
23 talking about the lists or the actual

1 documents themselves?

2 MR. BROWN: The actual documents.

3 MR. BROOKES: Let's talk after and try  
4 to figure that out.

5 MR. BROWN: I would suggest at the  
6 minimum that if a party is seeking to  
7 introduce an exhibit into evidence, that  
8 copies of that exhibit or document, assuming  
9 that it is in a document form, that  
10 sufficient copies be also produced to  
11 counsel as they're proposed to being  
12 introduced so that at least we can all look  
13 at the same document at the same time.

14 MR. BROOKES: I don't have a problem  
15 with that. I think that's pretty standard.  
16 We would have one document for GP, one for  
17 DEP, one DOHA, one for Tim and one for me?

18 MR. BROWN: Yes.

19 MR. COLE: Your Honor, if  
20 Georgia-Pacific did produce a notebook for  
21 everybody and for you, would you find that  
22 helpful?

23 THE COURT: Yes, very much.

1 MR. KEYSER: One of my exhibits is a CD  
2 disc. I only have one copy of it. It may  
3 have already been supplied to the other  
4 parties. I don't know.

5 MR. COLE: That was an additional item  
6 that we wanted to take up. One of our  
7 exhibits is a computer simulation. We would  
8 propose to introduce it into evidence, using  
9 that with a laptop to show what's on the  
10 simulation.

11 MR. BROOKES: We also have a computer  
12 simulation and maybe we could get together  
13 and try to figure out if there's some kind  
14 of audiovisual equipment at that new City  
15 Hall, which sometimes these city counsels  
16 have some pretty sharp stuff. We might be  
17 able to figure out how to use that.

18 MR. KEYSER: My witness was going to  
19 bring the computer to show the simulation.

20 MR. BROWN: We were proposing the same  
21 thing but we just wanted to alert you, Your  
22 Honor, to make sure you had no problem.  
23 We've provided a copy of that, I believe,

1 already to petitioners so they're aware of  
2 it. This is not an argument for  
3 admissibility. This is just on the  
4 mechanics of how we show it, because I've  
5 run into problems among administrative law  
6 judges as to how we do it. That's what we  
7 were going to propose to do. Since that was  
8 the simplest, I believe we can do it so all  
9 parties could see it. It's very short.

10 THE COURT: Okay.

11 MR. BROOKES: We have no objection,  
12 Your Honor.

13 THE COURT: All right. Anything  
14 further we need to talk about today?

15 MR. BROWN: Your Honor, I don't know if  
16 you've used that hearing room that's been  
17 designated. I think we'll be using the same  
18 room, except for maybe one day where we  
19 maybe need to move somewhere else because of  
20 something previously scheduled.

21 THE COURT: Yes, sir.

22 MR. BROWN: Do you know if it has a  
23 stand for exhibits or should we bring one if

1 we're using a demonstrative exhibit of a  
2 board type?

3 THE COURT: Counsel, I just don't know.  
4 Normally they would have something like  
5 that, I would think, at least in that public  
6 facility. It's a very modern one. I guess  
7 the only way to determine that would to give  
8 a call over there. The contact person  
9 should be listed there on the notice of  
10 hearing and they would be able to tell you  
11 if there was such a piece of equipment in  
12 that room. That's the best I can tell you  
13 on that.

14 MR. COLE: We'll follow-up on that,  
15 Your Honor, and we'll let the other parties  
16 know so that we can be prepared on that. I  
17 thought you might have had a hearing in it  
18 before.

19 THE COURT: I may have and I just don't  
20 recall. I've used a number of rooms there.

21 MR. BROWN: Okay.

22 THE COURT: Okay. If there's nothing  
23 further, I'll try to get something out on

1 this today or tomorrow. It will probably be  
2 tomorrow to confirm this, and I'll see  
3 everyone at 12:30 then on Monday afternoon.  
4 All right. Thank you very much.

5 (ALJ disconnects from teleconference.)

6 MR. KEYSER: I have a question for the  
7 department and GP about the standing. Do  
8 you stipulate the standing or not?

9 MR. BROWN: We honestly have not  
10 discussed that. I don't know the degree to  
11 which that would be at issue.

12 MR. COLE: We can give you an answer on  
13 that by tomorrow morning, couldn't we, Jeff?

14 MR. BROWN: We certainly could.

15 MR. COLE: We need to chat about it a  
16 minute but we'll let both of you know  
17 tomorrow if we believe that you need to  
18 provide evidence on that.

19 MR. BROOKES: Will you let us know,  
20 too, what we -- if we could even take part  
21 in that discussion, that would be good  
22 because we'll need to know too.

23 MR. COLE: I'll send it to both of you

1 when I set that up. I certainly would.

2 MS. FOLKES: That's fine.

3 MR. BROOKES: One other thing --

4 MS. FOLKES: I haven't thought about it  
5 either.

6 MR. KEYSER: Okay. Well, the  
7 department usually doesn't object to  
8 standing.

9 MS. FOLKES: That's not true.

10 MR. KEYSER: Okay. Well, based on my  
11 past experience, I haven't known them to  
12 object to standing before.

13 MS. FOLKES: Well, it depends on the  
14 circumstances.

15 MR. KEYSER: Well, in this case --

16 MR. BROOKES: Putnam County  
17 Environmental Counsel and a plant that's in  
18 Putnam County?

19 MR. KEYSER: And the Stewards for the  
20 St. Johns River. Those are the two clients  
21 I represent.

22 MR. BROOKES: Certainly they're  
23 interested in the river, I would think,



1 Francine.

2 MR. BROWN: The reason, Tim, to be  
3 honest with you -- and I'm not saying this  
4 because we're making it an issue or not  
5 because we need to talk to our client on  
6 that -- the reason there might be an issue  
7 in this if this was a new project and we  
8 were proposing to build a mill and discharge  
9 a new discharge, then I probably would just  
10 say right off the bat you've pled it  
11 adequately. But this one's a little more  
12 complicated.

13 And as to a renewal of the permit. We  
14 may be able to show an overall environmental  
15 improvement as a result of this and how are  
16 you hurt if that's the case. I just had a  
17 case where that exact thing happened and  
18 that's why I want to think about it. But on  
19 the other hand, I would not make you or  
20 Ralph bring in and tie up your client's  
21 time, people have to take off work, if we  
22 think you're going to be able to demonstrate  
23 it anyway. That's why I wanted to think

1       about it. Because I think this is a little  
2       -- there could be a little variation on  
3       that. So that was the reason for wanting to  
4       think about it but I would not make you  
5       waste your time if we think it's --

6               MR. KEYSER: Fair enough. I'll leave  
7       you with the thought that the pipeline, I  
8       think, could be considered a new project but  
9       with that I'll go.

10              MR. BROWN: Okay. And I appreciate  
11       that.

12              MR. KEYSER: Bye.

13              (Mr. Keyser disconnects from  
14       teleconference.)

15              MR. BROOKES: It's also 403.412, too,  
16       just to think about it. The other thing I  
17       wanted to ask you is a little more informal.  
18       I'm trying to get an airplane back to  
19       Florida at five o'clock and I think we're  
20       starting at 3:00. If there's anything you  
21       can do to get ready and get this thing going  
22       quick -- I know that, Terry, you've been  
23       excellent in your questions and your time.

1 MR. COLE: Jeff is doing this one.

2 MR. BROWN: I'll make it a point to  
3 talk fast, Ralph.

4 MR. BROOKES: Okay. Thanks, Jeff.

5 MR. BROWN: Your welcome.

6 MR. COLE: Are we done?

7 MR. BROWN: I think so. Thanks a lot.

8 MS. FOLKES: I guess the only thing --  
9 I did receive -- well, even though I'm not  
10 putting together a prehearing stip still I  
11 need an updated list, Ralph, as soon as you  
12 can.

13 MR. BROOKES: Can I send it to you by  
14 e-mail? You're in Jacksonville. If I send  
15 it to your e-mail will you get it from  
16 wherever you are?

17 MS. FOLKES: E-mail is how you can get  
18 me stuff. Let me ask you this: Can you  
19 possibly send your corrected amended  
20 petition by e-mail?

21 MR. BROOKES: Yes. Can you get it that  
22 way, too?

23 MS. FOLKES: Yes. That would be

1 helpful.

2 MR. BROOKES: I think it's in Word.  
3 Are you able to read Word or should I try to  
4 convert it to RTF or Word Perfect first?

5 MS. FOLKES: Word is fine.

6 MR. BROOKES: Okay.

7 MS. FOLKES: Because they faxed me the  
8 fax and I'm having difficulty reading it.

9 MR. BROWN: If we could get copies on  
10 that also, Ralph.

11 MR. BROOKES: Okay. Fine. Jeff, are  
12 you okay with Word?

13 MR. BROWN: Terry likes word, I don't,  
14 but that's another story.

15 MR. COLE: Get it to us and we can take  
16 care of how we do it.

17 MR. BROWN: All right. Goodbye,  
18 counsel.

19 MS. FOLKES: Okay. Thank you.

20 MR. BROOKES: Bye.

21 (Deposition concluded at 12:00 p.m.)  
22  
23


## C E R T I F I C A T E

STATE OF ALABAMA:

COUNTY OF MOBILE:

I do hereby certify that the above foregoing transcript of proceedings in the matter aforementioned was taken down by me in machine shorthand, and the questions and answers thereto were reduced to writing under my personal supervision, and that the foregoing represents a true and correct transcript of the proceedings given by said witness upon said hearing.

I further certify that I am neither of counsel nor of kin to the parties to the action, nor am I anyway interested in the result of said cause.

  
JANET C. BROOKS  
COURT REPORTER

MY COMMISSION EXPIRES 06/08/02